CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 34 MARCH 22, 2000 NO. 12

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Part 12

(T.D. 00–16)

RIN 1515–AC61

EXTENSION OF IMPORT RESTRICTIONS IMPOSED ON CERTAIN CATEGORIES OF ARCHAEOLOGICAL MATERIAL FROM THE PREHISPANIC CULTURES OF THE REPUBLIC OF EL SALVADOR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to reflect the extension of the import restrictions on certain categories of archaeological material from the Prehispanic cultures of the Republic of El Salvador which were imposed by T.D. 95–20. The Under Secretary for Public Diplomacy and Public Affairs, United States Department of State has determined that conditions continue to warrant the imposition of import restrictions. Accordingly, the restrictions will remain in effect for an additional 5 years, and the Customs Regulations are being amended to indicate this extension. These restrictions are being imposed pursuant to determinations of the United States Department of State made under the terms of the Convention on Cultural Property Implementation Act in accordance with the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. T.D. 95–20 contains the Designated List of archaeological material representing Prehispanic cultures of El Salvador.

EFFECTIVE DATE: March 8, 2000.

FOR FURTHER INFORMATION CONTACT: (Legal Aspects) Michael L. Smith, Intellectual Property Rights Branch (202) 927–1996; (Operational Aspects) Alfred Morawski, Other Government Agencies Branch (202) 927–0402.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to the provisions of 1970 UNESCO Convention (codified into U.S. law as the "Convention on Cultural Property Implementation Act" (Pub.L. 97–446, 19 U.S.C. 2601 *et seq.)* ("the Act")), the United States entered into a bilateral agreement with the Republic of El Salvador on March 8, 1995, concerning the imposition of import restrictions on certain categories of archeological material from the Prehispanic cultures of the Republic of El Salvador. The United States Customs Service issued T.D. 95–20 (March 10, 1995), amending § 12.104g(a) of the Customs Regulations (19 CFR 12.104g(a)) to reflect the imposition of these restrictions and including a list designating the types of article covered by the restrictions.

After reviewing the findings and recommendations of the Cultural Property Advisory Committee, the Under Secretary for Public Diplomacy and Public Affairs, United States Department of State, concluding that the cultural heritage of El Salvador continues to be in jeopardy from pillage of Prehispanic archaeological resources, made the necessary determinations to extend the import restrictions for an additional five years on February 14, 2000. Accordingly, Customs is amending § 12.104g(a) (19 CFR 12.104g(a)) to reflect the extension of the import restrictions.

The Designated List of Archaeological Material Representing Prehispanic Cultures of El Salvador covered by these import restrictions is set forth in T.D. 95–20. The Designated List and accompanying image database may also be found at the following internet website address: http://e.usia.gov/education/culprop.

The restrictions on the importation of these archaeological materials from the Republic of El Salvador are to continue in effect until March 8, 2005. Importation of such material continues to be restricted unless:

(1) accompanied by appropriate export certification issued by the Government of the Republic of El Salvador or;

(2) with respect to Pre-Columbian material from archaeological sites throughout El Salvador, documentation exists that exportation from El Salvador occurred prior to March 10, 1995; or;

(3) with respect specifically to Pre-Columbian material from the Cara Sucia archaeological region, documentation exists that exportation from El Salvador occurred prior to September 7, 1987.

REGULATORY AMENDMENT

This document amends § 12.104g(a), Customs Regulations (19 CFR 12.104g(a)) extending the effective date for five years for the import restrictions on the archaeological material representing Prehispanic cultures of the Republic of El Salvador.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE

This amendment is being made without notice or public procedure pursuant to 5 U.S.C. 553(a)(1). In addition, pursuant to 5 U.S.C.

553(b)(B), Customs has determined that such notice or public procedure would be impracticable and contrary to the public interest because the action being taken is essential to avoid interruption of the application of the existing import restrictions. For the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)* do not apply.

EXECUTIVE ORDER 12866

This amendment does not meet the criteria of a "significant regulatory action" as described in E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Keith B. Rudich, Esq., Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 12

Cultural property, Customs duties and inspections, Imports.

AMENDMENT TO THE REGULATIONS

Accordingly, Part 12 of the Customs Regulations (19 CFR Part 12) is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The general authority and specific authority citation for Part 12, in part, continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * * * *

2. In § 12.104g(a), the table of the list of agreements imposing import restrictions on described articles of cultural property of State Parties is amended in the entry for El Salvador by adding "extended by T.D. 00–16" immediately after "T.D. 95–20" in the column headed "T.D. No.".

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: March 1, 2000.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, March 9, 2000 (65 FR 12470)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, March 8, 2000.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE CLASSIFICATION OF A WOMAN'S KNIT TOP

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of classification ruling letter and treatment relating to the classification of a woman's knit top.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of a woman's knit top and revoke any treatment previously accorded by Customs to substantially identical merchandise. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before April 21, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Textile Classification Branch, 1300 Pennsylvania Avenue. N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, 1300 Pennsylvania Avenue, N.W., Washington D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Branch, (202) 927–2394.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of a woman's knit top. Although in this notice Customs is specifically referring to one ruling, Port Decision Letter (PD) E87711, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the

part of the importer or its agents for importations subsequent to the effective date of the final decision of this notice.

In PD E87711, dated September 29, 1999, the classification of a woman's knit top was determined to be in heading 6114, HTSUS, which provides for women's other knit garments. This ruling letter is set forth in "Attachment A" to this document. Since the issuance of this ruling, Customs has had a chance to review the classification of this merchandise and has determined that the classification is in error.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke PD E87711, and any other rulings not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 963467 (*see* "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: March 2, 2000.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Boston, MA, September 29, 1999.

CLA–2–61–DD:C:D:101
Category: Classification
Tariff No. 6114.20.0010

MS. BRENDA A. JACOBS
POWELL, GOLDSTEIN, FRAZER & MURPHY LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

Re: The tariff classification of a women's upper body garment from Macau or China.

DEAR MS. JACOBS:

In your letter dated September 15, 1999, on behalf of your client Hoi Meng Garment Manufactory Ltd., you requested a tariff classification ruling.

Style number 1 is a women's 100% cotton knitted upper body garment. It extends from the shoulders to below the waist and features spaghetti straps. The garment covers the front of the body beginning just above the sternum to below the waist. In the rear the garment covers just under one-half of the back and extends below the waist.

Your sample is returned as requested.

The applicable subheading for the garment will be 6114.20.0010, Harmonized Tariff Schedule of the United States (HTS), which provides for other garments, knitted or crocheted: Of cotton: Tops: Women's or girls'. The rate of duty will be 14.5 percent ad valorem.

The garment falls within textile category designation 339. Based upon international textile trade agreements, products of Macau or China are subject to quota and the requirements of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information, we suggest that you check close to the time of shipment, the *U.S. Customs Service Textile Status Report*, an internal issuance of the U.S. Customs Service, which is available at the Customs Web Site at *WWW.CUSTOMS.USTREAS.GOV.* In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported.

VICTOR G. WEEREN,
Port Director,
Boston, Massachusetts.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 963467 jb
Category: Classification
Tariff No. 6109.10.0060

BRENDA JACOBS, ESQ.
POWELL, GOLDSTEIN, FRAZER & MURPHY LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

Re: Classification of women's knit upper body garment; revocation of PD E87711.

DEAR MS. JACOBS:

This is in response to your letter, dated October 15, 1999, on behalf of your client, Hoi Meng Garment Manufactory Ltd., regarding a request for reconsideration of Port Decision Letter (PD) E87711, dated September 29, 1999, which addressed the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of a woman's knit top. Upon review of that ruling we find that the classification of that merchandise in heading 6114, HTSUS, is in error. The correct classification for this merchandise is in heading 6109, HTSUS, pursuant to the analysis which follows below.

Facts:

The subject sleeveless garment, referenced style number 1, is composed of a 100 percent cotton rib knit fabric and features ¼ inch elasticized shoulder straps, a "U" shaped neckline in front and back, and a hemmed bottom. The garment also has a double layer of fabric at the front bodice and embroidery at the top of the front of the garment.

Issue:

What is the proper classification for the subject garment?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI). GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI will be applied, in the order of their appearance.

The two classification provisions at issue for this merchandise are heading 6109, and heading 6114, HTSUS. Note 5 to chapter 61, HTSUS, states that, "Heading 6109 does not cover garments with a drawstring, ribbed waistband or other means of tightening at the bottom of the garment." Heading 6109, HTSUS, provides for, among other things, tank tops. As the term "tank top" is neither defined in the legal notes to the HTSUS nor in the corresponding *Explanatory Notes to the Harmonized Commodity Description and Coding System* (EN), we look to the *Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories*, CIE 13/88 (1988), (herein *Guidelines*) for assistance. The *Guidelines* definition of the term "tank top" is indicative of a garment which is:

> * * * sleeveless with oversized armholes, with or without a significant drop below the arm. The front and the back may have a round, V, U, scoop, boat, square or other shaped neck which must be below the nape of the neck. The body of the garment is supported by straps not over two inches in width reaching over the shoulder. The straps must be attached to the garment and not be easily detachable. Bottom hems may be straight or curved, side-vented, or of any other type normally found on a blouse or shirt, including blouson or drawstring waists or an elastic bottom. The following features would preclude a garment from consideration as a tank top:
>
> 1) pockets, real or simulated, other than breast pockets;
> 2) any belt treatment including simple loops;
> 3) any type of front or back neck opening (zipper, button, or otherwise).

This definition is consistent with the definition found in Charlotte Mankey Calasibetta's *Essential Terms of Fashion* (1986) at 221:

> Similar to men's undershirt with U-neckline and deep armholes, shaped toward shoulder to form narrow straps; named for tank suit. * * *

Before we can even arrive at the features which would preclude a garment from qualifying as a tank top, a garment must already possess certain basic features. It is clear from these definitions that the fundamental features of a "tank top" require a drop below the neckline front **and back**, as well as deep armholes in order to form **narrow straps**. These features are critical in creating the silhouette which is the distinguishing characteristic of the tank top.

The subject garment falls squarely within the descriptions set forth in the above stated definitions. That is, the shoulder straps are two inches or less in width, the neckline (both front and back) is U-shaped, the armholes are oversized, and there is no tightening at the bottom. As such, the subject sample is commonly recognized as what is known in the trade as a "tank top", and qualifies for classification in heading 6109, HTSUS.

Heading 6114, HTSUS, provides for other garments, knitted or crocheted. The EN to that heading state that, "this heading covers knitted or crocheted garments which are not included more specifically in the preceding headings of this Chapter." Accordingly, as we have already determined that the subject garment is more specifically recognized as a "tank top" in heading 6109, HTSUS, we are precluded from classifying this merchandise in heading 6114, HTSUS.

Holding:

The subject garment, referenced style 1, is correctly classified in subheading 6109.10.0060, HTSUSA, which provides for, T-shirts, singlets, tank tops and similar garments, knitted or crocheted: of cotton: women's or girls': tank tops: women's. The applicable general column one rate of duty is 18.3 percent *ad valorem* and the textile quota category is 339.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest your client check, close to the time of shipment, the *Status on Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local Customs office prior to importing the merchandise to determine the current applicability of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF ULTRA WHITE CONFECTIONER'S COATING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of a tariff classification ruling letter and the revocation of treatment relating to the classification of an Ultra White Confectioner's Coating.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling, and revoke any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of an Ultra White Confectioner's Coating under the Harmonized Tariff Schedule of the United States (HTSUS). Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before April 21, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulation and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Norman W. King, General Classification Branch (202) 927–1109.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act

of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of an Ultra White Confectioner's Coating. Although in this notice Customs is specifically referring to one ruling, New York Ruling Letter (NYRL) D82864, dated October 23, 1998, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to those identified. No further rulings have been found. This notice will cover any rulings on the merchandise, which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

NYRL D82864, dated October 23, 1998, is set forth as "Attachment A", in which Customs held that one of the products described as FE52E Ultra White Confectioner's Coating was classified in subheading 2106.90.8200, HTSUS, as other food preparations not elsewhere specified or included, containing over 10 percent by weight of milk solids. Customs is now of the opinion, that the Ultra White Coating is classified in subheadings 2106.90.64 or 2106.90.66, HTSUS, tariff rate quota provisions, as other food preparations not elsewhere specified or included, other dairy products containing over 10 percent by weight of milk solids.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to modify NYRL D82864 and revoke any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 963203 (*see*

"Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: March 6, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
New York, NY, October 23, 1998.

CLA-2-18:RR:NC:SP:232 D82864
Category: Classification
Tariff No. 1806.20.6000,
1806.20.9900 and 2106.90.8200

MR. CLAUDE SCHELLENBERGER
MAX FELCHLIN, INC.
Bahnhofstrasse 63
CH-6431 Schwyz, Switzerland

Re: The tariff classification of Coatings from Switzerland.

DEAR MR. SCHELLENBERGER:

In your letter dated September 23, 1998, you requested a tariff classification ruling.

You sent descriptive literature and samples of three types of coatings. The products in question are all coverings which are said to be ready to use without further processing upon importation. They are to be used for coating cakes, pastries, and confectioneries. All are hard pastes that will be imported in 5.5 kg pails.

The first item, product CP48E Ultra Blonde, milk coating, is said to contain 40 percent sugar, 39 percent hardened vegetable fat, 16 percent skimmed milk powder, 5 percent fat-reduced cocoa powder, and traces of vanillin and lecithin. Its milk fat content is said to be 0.1 percent. The second item, product CP53E Ultra Gloss, dark coating, is stated to consist of 45 percent sugar, 38 percent hardened vegetable fat, 15 percent fat-reduced cocoa powder, 2 percent dextrose, and traces of vanillin and lecithin.

The last item, product FE52E Ultra White, white coating, is said to contain 40 percent sugar, 37 percent hardened vegetable fat, 12 percent skimmed milk powder, 6 percent dextrose, 5 percent whole milk powder, and traces of vanillin and lecithin. Its milk fat content is said to be 1.4 percent.

The applicable subheading for the CP53E Ultra Gloss, dark coating, will be 1806.20.6000, Harmonized Tariff Schedule of the United States (HTS), which provides for Chocolate and other food preparations containing cocoa: Other, in blocks, slabs or bars * * * or in liquid, paste, powder, granular or other bulk form in containers or immediate packings, of a content exceeding 2 kg: Confectioners' coatings and other products (except confectionery) containing by weight not less than 6.8 percent non-fat solids of the cocoa bean nib and not less than 15 percent of vegetable fats other than cocoa butter. The rate of duty will be 2.2 percent ad valorem.

The applicable subheading for the CP48E Ultra Blonde, milk coating, will be 1806.20.9900, Harmonized Tariff Schedule of the United States (HTS), which provides for

Chocolate and other food preparations containing cocoa: Other, in blocks, slabs or bars * * * or in liquid, paste, powder, granular or other bulk form in containers or immediate packings, of a content exceeding 2 kg: Other: Other: Other: Other. The rate of duty will be 9 percent ad valorem.

The applicable subheading for the FE52E Ultra White, white coating, will be 2106.90.8200, Harmonized Tariff Schedule of the United States (HTS), which provides for Food preparations not elsewhere specified or included: Other: Containing over 10 percent by weight of milk solids: Other: Other. The rate of duty will be 7.6 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling, or the control number indicated above, should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist John Maria at 212–466–5730.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 963203K
Category: Classification
Tariff No. 2106.90.6400 and 2106.90.6600

MR. CLAUDE SCHELLENBERGER
MAX FELCHIN, INC.
Bahnhostrasse 63
CH–6431 Schwyz, Switzerland

Re: Modification of New York Ruling Letter (NYRL) D82864; FE52E Ultra White Confectioner's Coating.

DEAR SIR:

In response to your letter dated September 23, 1998, on October 23, 1998, Customs issued NYRL D82864, concerning the classification of several products, one of which was described as FE52E Ultra White Confectioner's Coating that was classified in subheading 2106.90.8200, HTSUS, as other food preparations not elsewhere specified or included, containing over 10 percent by weight of milk solids. NYRL D82864 no longer represents the views of Customs for this product. Our position follows.

Facts:

Ultra White, White Coating FE52E, is described in NYRL D82864 as containing 40 percent sugar, 37 percent hardened vegetable fat, 12 percent skimmed milk powder, 6 percent dextrose, 5 percent whole milk powder with a milk fat content of 1.4 percent, and traces of vanillin and lecithin.

Issue:

What is the proper classification of the product?

Law and Analysis:

In Headquarters Ruling Letter (HRL) 960017, dated July 23, 1998, published pursuant to 19 USC 1625 in CUSTOMS BULLETIN Vol. 32, No. 32, dated August 12, 1998, Customs modified NYRL A80434 for a similar product (FE51E) and classified the product, in subheadings 2106.90.64, and 2106.90.66, HTSUS, as other food preparations not elsewhere specified or included, other dairy products containing over 10 percent by weight of milk solids, subject to tariff rate quotas. This ruling did not specifically modify or revoke treatment previously accorded by Customs to substantially identical merchandise or covered by

other rulings that were not specifically modified or revoked by HRL 960017. Accordingly, this decision specifically modifies NYRL D82864, and effectively modifies or revokes any prior rulings or prior treatment extended to identical merchandise covered by HRL 960017 and this ruling letter.

For purposes of clarity, we repeat the LAW AND ANALYSIS of HRL 960017 as follows:

> Additional U.S. Note 1 of Chapter 4, HTSUS, states that:
>
> For the purposes of this schedule, the term "dairy products described in additional U.S. note 1 to chapter 4" means any of the following goods: malted milk, and articles of milk or cream (except (a) white chocolate and (b) inedible dried milk powders certified to be used for calibrating infrared milk analyzers); articles containing over 5.5 percent by weight of butterfat which are suitable for use as ingredients in the commercial production of edible articles (except articles within the scope of other import quotas provided for in additional U.S. notes 2 and 3 to chapter 18); or, dried milk, whey or buttermilk (of the type provided for in subheadings 0402.10, 0402.21, 0403.90 or 0404.10) which contains not over 5.5 percent by weight of butterfat and which is mixed with other ingredients, including but not limited to sugar, if such mixtures contain over 16 percent milk solids by weight, are capable of being further processed or mixed with similar or other ingredients and are not prepared for marketing to the ultimate consumer in the identical form and package in which imported.
>
> Subheadings 2106.90.64 and 2106.90.66, HTSUS, provide for food preparations not elsewhere specified or provided for, other dairy products described in Additional U.S. Note 1 to Chapter 4. A "dairy product described in Additional U.S. Note 1 to Chapter 4" may be an article falling into any of three classes of merchandise described therein: malted milk and articles of milk or cream, certain articles containing over 5.5 percent butterfat, and, what is relevant here, "dried milk, whey or buttermilk (of the type provided for in subheadings 0402.10, 0402.21, 0403.90, or 0404.10) which contains not over 5.5 percent by weight of butterfat and which is mixed with other ingredients, including but not limited to sugar, if such mixtures contain over 16 percent milk solids by weight, are capable of being further processed or mixed with similar or other ingredients and are not prepared for marketing to the ultimate consumer in the identical form and package in which imported." FE51E Ultra White falls into this third category of articles.
>
> FE51E Ultra White is composed of dried skimmed milk powder, a product of subheading 0402.10, that is mixed with other ingredients. It contains over 16 percent milk solids by weight (12 percent skimmed milk powder and 5 percent whole milk powder), is capable of being further processed or mixed with similar or other ingredients, and is not prepared for marketing to the ultimate consumer in the identical form and package in which imported. The terms "capable of being further processed * * *", "prepared for marketing to the ultimate consumer * * *", and "ultimate consumer", are defined in Section IV, Additional U.S. Notes 2(b), (c), and (d), HTSUS. Those definitions are applicable for FE51E Ultra White. The product is "capable of being further processed * * *" because it is a solid material, and must be heated to change it to a fluid consistency before it be used. It is, therefore, "in such condition * * * as to be subject to any additional preparation, treatment or manufacture * * *". It is not prepared for marketing to the ultimate consumer because it will be sold to pastry chefs and confectioners, neither of which are considered an "ultimate consumer" by Section IV, Additional U.S. Note 2(d), HTSUS.
>
> Subheadings 2106.90.64 and 2106.90.66 fall under the superior heading for "other, dairy products described in Additional U.S. Note 1 to Chapter 4." In contrast, 2106.90.82, is the residual subheading under an "other * * * other" subheading. Clearly, 2106.90.64 and 2106.90.66 are the more demanding, and therefore more specific tariff provisions. If the product meets the requirements for classification in either of these two subheadings, it must be classified there and we believe that it does.

Holding:

FE52E Ultra White is substantially identical to the product FE51E, as described in HRL 960017, and it is classified as other food preparations not elsewhere specified or included, other dairy products containing over 10 percent by weight of milk solids, in subheading 2106.90.64, HTSUS, if within the quantitative limitations of Additional U.S. Note 10 to Chapter 4. If the quantitative limitations of the Note have been reached, the product is classified in subheading 2106.90.66, HTSUS.

NYRL D82864, dated October 23, 1998, is modified. HRL 960017 is followed.

In accordance with 19 U.S.C. 1625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), of the Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION AND MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN MARBLE FIREPLACE SURROUNDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation and modification of tariff classification ruling letters and the revocation of treatment relating to the classification of marble fireplace surrounds.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings and to modify another, and to revoke any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of marble fireplace surrounds, under the Harmonized Tariff Schedule of the United States (HTSUS). Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before April 21, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to: U.S. Customs Service, Office of Regulation and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, General Classification Branch: (202) 927–2318.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended,

and related laws. Two new concepts, which emerge from the law, are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke two rulings and modify another. The first, Headquarters Ruling Letter (HQ) 955505, dated March 22, 1994, pertains to the classification of marble fireplace surrounds (stone articles designed to fit into a fireplace consisting of several pieces, i.e., header, footer, hearth, riser or legs). The second, HQ 960495, dated December 12, 1997, also pertains to the classification of marble fireplace surrounds. The third, which is to be modified, is HQ 960617, dated December 16, 1997, and also concerns marble fireplace surrounds. HQs 955505, 960495 and 960617 are respectively set forth as "Attachment A," "Attachment B" and "Attachment C" to this document.

In each ruling, Customs reasoned that because the articles were, in their condition as imported, designed to function as and comprise a complete fireplace surround, the articles were classifiable as other articles of marble under subheading 6802.91.15, HTSUS. That is, by operation of GRI 1, Customs determined that the articles were classifiable under subheading 6802.91, as marble. Pursuant to GRI 6, the remaining GRIs were applied in order to determine which subheading best described the articles as imported. We reasoned that because the marble slabs were installed together to form a uniquely shaped fireplace surround, they comprised an unassembled article and were therefore classifiable as marble other than in slab form.

Although in this notice Customs is specifically referring to three rulings, HQs 955505, 960495 and 960617, this notice covers any rulings on this merchandise that may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to those identified. One ruling, HQ 959301 dated October 9, 1997, which classified fireplace surrounds of serpentine stone in subheading 6802.99.00, HTSUS, may involve merchandise and issues similar to those in HQs 955505, 960495 and 960617.

Because in HQ 959301 there is no discussion of the "unassembled" issue, and because the articles were determined to be serpentine, a type of stone geologically distinct from marble, there is no need to revoke or modify this ruling. Otherwise, no further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, other than the referenced rulings (see above), should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke HQs 955505 and 960495, and to modify HQ 960617, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed HQ 963321 and 963766 (*see* "Attachment D" and "Attachment E" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: March 3, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, March 22, 1994.

CLA–2 CO:R:C:M 955505 KCC
Category: Classification
Tariff No. 6802.91.15

DISTRICT DIRECTOR
U.S. CUSTOMS SERVICE
1 East Bay Street
Room 104
Savannah, GA 31401

Re: Protest 1704–93–100338; marble fireplace surround sets; slabs; Additional U.S. Note 1, Chapter 68; 6802.91.05.

DEAR DISTRICT DIRECTOR:

This is in reference to Protest 1704–93–100338, which pertains to the tariff classification of marble fireplace surround sets under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

The marble fireplace surround sets are stone articles designed to fit into a fireplace. Each product is an unassembled article consisting of several pieces, *i.e.*, header, riser, legs and hearth, which form a special shape suited for a particular fireplace.

The entries of the marble fireplace surround sets were liquidated starting on July 2, 1993, under subheading 6802.91.15, HTSUS, as other articles of marble. In a protest timely filed on July 21, 1993, the protestant contends that the marble fireplace surround sets are classified under subheading 6802.91.05, HTSUS, as marble slabs pursuant to Additional U.S. Note 1, Chapter 68, HTSUS.

The competing subheadings are:

6802	Worked monumental or building stone (except slate) and articles thereof, other than goods of heading 6801; mosaic cubes and the like, of natural stone (including slate), whether or not on a backing; artificially colored granules, chippings and powder, of natural stone (including slate) * * *
6802.91.05	Other * * * Marble, travertine and alabaster * * * Marble * * * Slabs.
6802.91.15	Other * * * Marble, travertine and alabaster * * * Marble * * * Other.

Issue:

Are the marble fireplace surround sets classified under subheading 6802.91.05, as marble slabs, or under subheading 6802.91.15, HTSUS, as other articles of marble?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to terms of the headings and any relative section or chapter notes. * * *"

The marble fireplace surround sets are clearly classified under subheading 6802.91, HTSUS, as marble. The issue to be determined is whether the articles are slabs pursuant to Additional U.S. Note 1, Chapter 68, HTSUS, which states:

> For the purposes of heading 6802, the term "*slabs*" embraces flat stone pieces, not over 5.1 cm in thickness, having a facial area of 25.8 cm^2 or more, the edges of which have not been beveled, rounded or otherwise processed except such processing as may be needed to facilitate installation as tiling or veneering in building construction.

The protestant argues that the imported marble articles meet the definition of slabs in Additional U.S. Note 1, Chapter 68, HTSUS. The marble articles are 2 cm thick, have facial areas which are larger than 25.8 cm^2 and the edges have not been further processed.

Although the marble articles may meet the definition in Additional U.S. Note 1, Chapter 68, HTSUS, they are not merely marble slabs. As imported the marble pieces are designed and shaped to form a complete article, a fireplace surround set. The marble pieces of the

unassembled surround set fit together to form an item with a unique shape. It is product which is clearly not a slab. Moreover, the invoice description of the marble pieces describes them as "Marble fireplace surround sets." Therefore, the marble fireplace surround sets are classified under subheading 6802.91.15, HTSUS, as other articles of marble.

Holding:

The marble fireplace surround sets are classified under subheading 6802.91.15, HTSUS, as other articles of marble.

The protest should be *DENIED*. In accordance with Section 3A(11) (b) of Customs Directive 099 3550–065, dated August 4, 1993, Subject: Revised Protest Directive, this decision should be mailed, with the Customs Form 19, by your office to the protestant no later than 60 days from the date of this letter. Any reliquidation of the entry in accordance with the decision must be accomplished prior to mailing of the decision. Sixty days from the date of the decision the Office of Regulations and Rulings will take steps to make the decision available to Customs personnel via the Customs Rulings Module in ACS and the public via the Diskette Subscription Service, Lexis, Freedom of Information Act, and other public access channels.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, December 12, 1997.

CLA–2 RR:TC:CG 960495 PH
Category: Classification
Tariff No. 6802.91.15

MS. PAM BROWN
CARGO U.K., INC.
4790 Aviation parkway
Atlanta, GA 30349

Re: Marble fireplace surrounds; marble merely cut into blocks or slabs; slabs; other articles of marble; "green marble"; serpentine; geological definition of stone products; 2515.12.10; 6802.91.05; 6802.91.15; Note 1, Chapter 25; Additional U.S. Note 1, Chapter 68; EN 25.15; HQs 085266; 089576; 951047; 951323; 952678; 952679; 955505; 955738; 956092; 956489; 959301.

DEAR MS. BROWN:

In your letter of April 9, 1997, on behalf of P & T International (AKA YEH's Trading Company), you request a binding ruling on the prospective importation of marble fireplace kits. Descriptive literature was submitted.

Facts:

The merchandise is described as "[m]arble fireplace kits (unassembled)" and specifications are provided. The merchandise is described as "TAIWAN GREEN" and is stated to have been quarried in Taiwan. According to material you submitted, the pieces of stone making up the kits are polished on both sides. No other information is provided. For purposes of this ruling, we assume that the fireplace kits consist of all of the pieces necessary to form a special shape suited for a particular fireplace, that the pieces are specially cut to size, and that the edges of the pieces have not been beveled, rounded or otherwise processed except to the degree needed to facilitate installation.

The competing subheadings are as follows:

2515.12.10	Marble, travertine and other calcareous monumental or building stone of an apparent specific gravity of 2.5 or more, and alabaster, whether or

not roughly trimmed or merely cut, by sawing or otherwise, into blocks or slabs of a rectangular (including square) shape: Marble and travertine: * * * Merely cut, by sawing or otherwise, into blocks or slabs of a rectangular (including square) shape: Marble.

The 1997 general column one rate of duty for goods classifiable under this provision is 0.8% *ad valorem*.

6802.91 Worked monumental or building stone (except slate) and articles thereof, other than goods of heading 6801; mosaic cubes and the like, of natural stone (including slate), whether or not on a backing; artificially colored granules, chippings and powder, of natural stone (including slate) * * *: Other: Marble, travertine and alabaster.

The 1997 general column one rate of duty for goods classifiable under this subheading in subheading 6802.91.05 ("* * * Marble: Slabs") is 2.6% *ad valorem* and in subheading 6802.91.15 ("* * * Marble: * * * Other") is 5.3% *ad valorem* .

6802.99.00 Worked monumental or building stone (except slate) and articles thereof, other than goods of heading 6801; mosaic cubes and the like, of natural stone (including slate), whether or not on a backing; artificially colored granules, chippings and powder, of natural stone (including slate) * * *: Other: * * * Other stone.

The 1997 general column one rate of duty for goods classifiable under this provision is 6.5% *ad valorem*.

Issues:

Are unassembled marble fireplace kits classified as marble merely cut into blocks or slabs under subheading 2515.12.10, HTSUS, marble slabs under subheading 6802.91.05, HTSUS, or other articles of marble under subheading 6802.91.15, HTSUS?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, published in the *Federal Register* August 23, 1989 (54 FR 35127, 35128).

Initially, we note that merchandise described as "green marble" has frequently been found to be serpentine when subjected to laboratory analysis. See, *e.g.* rulings HQ 952679 dated January 26, 1993, 956092 dated July 29, 1994, and 956489 dated September 20, 1994, each involving merchandise invoiced and claimed to be green marble but found, upon analysis by a Customs laboratory, to be serpentine; see also, for your information, Informed Compliance Publication on Marble, November, 1996 (CUSTOMS BULLETIN of January 2, 1997, vol. 30/31, no. 52/1, at 191). In this regard, we note that the geological definition rather than the trade definition is used in determining the tariff classification of stone products (see, *e.g.* rulings HQ 085266 dated September 20, 1989, 951323 dated October 2, 1992, and 955738 dated March 30, 1994). If the merchandise under consideration is of serpentine, classification is in accordance with ruling HQ 959301 dated October 9, 1997. That is, if the merchandise is actually an unassembled fireplace surround of serpentine, or if it consists of individual worked slabs of serpentine, the proper classification is in subheading 6802.99.00, HTSUS.

In regard to fireplace kits *actually* of marble, classification in Chapter 25, HTSUS, is precluded because the merchandise has been worked to a degree beyond that permitted for products of that Chapter. Under Note 1 of Chapter 25:

> * * * [T]he headings of this chapter cover only products which are in the crude state or which have been washed (even with chemical substances eliminating the impurities without changing the structure of the product), crushed, ground, powdered, levigated, sifted, screened, concentrated by flotation, magnetic separation or other mechanical

> or physical processes (except crystallization), but not products which have been roasted, calcined, obtained by mixing or subjected to processing beyond that mentioned in each heading.

According to EN 25.15, heading 2515 "* * * is restricted to the stones specified, presented in the mass or roughly trimmed or merely cut, by sawing or otherwise, into blocks or slabs of a rectangular (including square) shape." According to the available information, the merchandise is worked beyond the mass or mere cutting into blocks or slabs. Thus classification may not be in subheading 2515.12.10 (see ruling HQ 089576 dated October 17, 1991).

If the merchandise consists of complete unassembled fireplace kits (*i.e.* the kits consist of the pieces (header, riser, legs and hearth) which form a special shape suited for a fireplace) actually made of marble, classification is in accordance with ruling HQ 955505 dated March 22, 1994. That is, classification is in subheading 6802.91.15, HTSUS, as other articles of marble. If the merchandise consists of individual pieces of marble which are worked beyond being pieces of marble, simply cut or sawn, with a flat or even surface (see subheading 6802.21, HTSUS), classification is in accordance with ruling HQ 952678 dated December 30, 1992 (see also HQ 951047 dated September 17, 1992). That is, if the pieces meet the definition of "slabs" in Additional U.S. Note 1 to Chapter 68, classification is in subheading 6802.91.05, HTSUS, as slabs of marble. If the pieces do not meet the definition of "slabs" in Additional U.S. Note 1 to Chapter 68 (see above), classification is in subheading 6802.91.15, HTSUS, as other articles of marble.

Under Additional U.S. Note 1 to Chapter 68:

> For the purposes of heading 6802, the term "slabs" embraces flat stone pieces, not over 5.1 cm in thickness, having a facial area of 25.8 cm2 or more, the edges of which have not been beveled, rounded or otherwise processed except such processing as may be needed to facilitate installation as tiling or veneering in building construction.

In rulings HQ 952678 and 951047, *supra*, Customs held that under the above definition, pieces the edges of which were cut more deeply or more widely than 1/32 of an inch were considered to have been "beveled, rounded or otherwise processed" to a greater extent than that needed to facilitate installation. Such pieces do not meet the definition of "slabs" in Additional U.S. Note 1 to Chapter 68.

Holding:

Unassembled marble fireplace kits are classified in subheading 6802.91.15, HTSUS, as other articles of marble. (If the merchandise is actually an unassembled fireplace surround of serpentine, classification is in subheading 6802.99.00, HTSUS.)

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, December 16, 1997.

CLA–2 RR:CR:CG 960617 PH
Category: Classification
Tariff No. 6802.91.05 and 6802.91.15

RICHARD H. ABBEY, ESQ.
JOEL W. ROGERS, ESQ.
ABLONDI, FOSTER, SOBIN & DAVIDOW, P.C.
1130 Connecticut Avenue, NW, Suite 500
Washington, DC 20036

Re: Fireplace surrounds; marble; slabs; other marble; "condition as imported"; *United States v. Citroen*, 223 U.S. 407 (1911); *United States v. Baldt Anchor*, 59 CCPA 122 (1972); *KMW Johnson, Inc. v. United States*, 13 CIT 1079 (1989); C.S.D. 92–11; HQs 955505; 952678; 951047.

DEAR MESSRS. ABBEY AND ROGERS:

In your letter of April 29, 1997, on behalf of Intercontinental Marble Corporation, you request clarification of ruling HQ 955505 dated March 22, 1994, on the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain marble fireplace surround sets.

Facts:

Ruling HQ 955505 is a protest decision concerning marble fireplace surround sets designed to fit into a fireplace. According to the ruling, each product is an unassembled article consisting of several pieces, *i.e.* header, riser, legs and hearth, which form a special shape suited for a particular fireplace.

In HQ 955505, after finding that the marble fireplace surround sets are clearly classified under subheading 6802.91, HTSUS, as marble, Customs considered the applicability of Additional U.S. Note 1, Chapter 68, HTSUS, which defines "slabs" for purposes of heading 6802. Customs concluded that:

> Although the marble articles may meet the definition in Additional U.S. Note 1, Chapter 68, HTSUS, they are not merely marble slabs. As imported the marble pieces are designed and shaped to form a complete article, a fireplace surround set. The marble pieces of the unassembled surround set fit together to form an item with a unique shape. It is [a] product which is clearly not a slab. Moreover, the invoice description of the marble pieces describes them as "Marble fireplace surround sets." Therefore, the marble fireplace surround sets are classified under subheading 6802.91.15, HTSUS, as other articles of marble.

The holding of ruling 955505 was in accordance with this conclusion; *i.e.*, that the marble fireplace surround sets are classified under subheading 6802.91.15, HTSUS, as other articles of marble.

You now ask Customs to rule that pieces of marble which meet the definition of "slabs" found in Additional U.S. Note 1, Chapter 68, HTSUS, are classifiable under subheading 6802.91.05, HTSUS, as marble slabs, if they are imported in several different shipment configurations. You describe the shipment configurations as follows:

> 1. Shipment by general piece type: Each shipment would consist of marble slabs of a single size which would be used as headers, footers, hearths, risers or legs.
> 2. Shipment of mixed pieces, not arranged in matched sets: Each shipment would consist of marble slabs of several different sizes *e.g.*, headers, footers, hearths, risers or legs) which have not been matched or crated as "fireplace surround sets."
> 3. Shipment of pieces arranged in matched, but incomplete sets: Each shipment would consist of matched marble slabs, but no group of slabs would contain all the pieces necessary to frame a fireplace. Thus, it would not be invoiced as a fireplace surround set. The additional piece or pieces would be imported in a separate shipment, by a different carrier, on a different day.

The subheadings under consideration are as follows:

6802.91.05	Worked monumental or building stone (except slate) and articles thereof, other than goods of heading 6801; mosaic cubes and the like, of natu-

ral stone (including slate), whether or not on a backing; artificially colored granules, chippings and powder, of natural stone (including slate) * * *: Other: Marble, travertine and alabaster: Marble: Slabs.

The 1997 general column one rate of duty for goods classifiable under this provision is 2.6% *ad valorem*.

6802.91.15 Worked monumental or building stone (except slate) and articles thereof, other than goods of heading 6801; mosaic cubes and the like, of natural stone (including slate), whether or not on a backing; artificially colored granules, chippings and powder, of natural stone (including slate) * * * Other: Marble, travertine and alabaster: Marble: * * * Other.

The 1997 general column one rate of duty for goods classifiable under this provision is 5.3% *ad valorem*.

Issue:

When unassembled marble fireplace kits consisting of all of the pieces necessary to form a particular fireplace are imported in importations each of which contains only parts of a fireplace kits (*i.e.* one or more, but not all, of the pieces of a fireplace kit are imported in one importation) and the pieces meet the definition of "slabs" in Additional U.S. Note 1, Chapter 68, HTSUS, are the importations of pieces classified as marble slabs under subheading 6802.91.05, HTSUS, or other marble under subheading 6802.91.15, HTSUS?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, published in the *Federal Register* August 23, 1989 (54 FR 35127, 35128).

As stated above, under ruling HQ 955505 dated March 22, 1994, complete unassembled fireplace kits of marble (*i.e.*, kits consisting of the pieces (header, riser, legs and hearth) which form a special shape suited for a fireplace) are classified in subheading 6802.91.15, HTSUS, as other marble. Individual pieces of marble which are worked beyond being pieces of marble, simply cut or sawn, with a flat or even surface (see subheading 6802.21, HTSUS), and which meet the definition of "slabs" in Additional U.S. Note 1, Chapter 68, HTSUS, are classified in subheading 6802.91.05, HTSUS, as slabs of marble (see rulings HQ 952678 dated December 30, 1992, and HQ 951047 dated September 17, 1992). If the individual pieces do not meet the definition of "slabs" in Additional U.S. Note 1 to Chapter 68 (see above), classification is in subheading 6802.91.15, HTSUS, as other marble.

Under Additional U.S. Note 1 to Chapter 68:

> For the purposes of heading 6802, the term "slabs" embraces flat stone pieces, not over 5.1 cm in thickness, having a facial area of 25.8 cm or more, the edges of which have not been beveled, rounded or otherwise processed except such processing as may be needed to facilitate installation as tiling or veneering in building construction.

In rulings HQs 952678 and 951047, *supra* Customs held that under the above definition, pieces the edges of which were cut more deeply or more widely than 1/32 of an inch were considered to have been "beveled, rounded or otherwise processed" to a greater extent than that needed to facilitate installation. Such pieces do not meet the definition of "slabs" in Additional U.S. Note 1 to Chapter 68.

Customs has consistently followed the long-standing classification principle enunciated by the Supreme Court in *United States v. Citroen*, 223 U.S. 407, 414–415 (1911). In that case the Court stated that:

> The rule is well established that "in order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." [Cita-

> tions omitted] This, of course, does not mean that a prescribed rate of duty can be escaped by resort to disguise or artifice. When it is found that the article imported is in fact the article described in a particular paragraph of the tariff act, an effort to make it appear otherwise is simply a fraud on the revenue, and cannot be permitted to succeed. [Citation omitted). But when the article imported is not the article described as dutiable at a specified rate, it does not become dutiable under the description because it has been manufactured or prepared for the express purpose of being imported at a lower rate. [Citations omitted] "So long as no deception is practiced, so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred." [Citation omitted] The inquiry must be—Does the article, as imported, fall within the description sought to be applied?

The issue in this case was very thoroughly examined in *KMW Johnson, Inc. v. United States*, 13 CIT 1079, 728 F. Supp. 754 (1989). After stating the general rule that classification is determined by the condition of imported articles at the time of importation, the Court described or defined the customs doctrine of "entireties" as follows:

> [I]f there are imported *in one importation* separate entities which by their nature are obviously intended to be used as a unit, or to be joined together by mere assembly, and in such use or joining the individual identities of the separate entities are subordinated to the identity of the combined entity, duty will be imposed upon the entity they represent.

Emphasis in original; 13 CIT at 1082, citing *Karoware, Inc. v. United States*, 77 Cust. Ct. 112, 125, C.D. 4681, 427 F. Supp. 402 (1976), and *Donalds Ltd. v. United States*, 32 Cust. Ct. 310, 315, C.D. 1619 (1954), *aff'd* 65 CCPA 1, C.A.D. 1197, 564 F.2d 77 (1977).

The Court in *KMW Johnson*, *supra*, went on to state, "[h]ence, in customs cases, 'articles that may constitute an 'entirety' cannot be classified as an 'entirety' if they are imported in more than one importation.'" (Citations omitted) Among the cases cited by the Court for this proposition is *United States v. Baldt Anchor*, 59 CCPA 122, C.A.D. 1051, 459 F.2d 1403 (1972). *Baldt Anchor* involved the importation, in two importations, of the machinery for the manufacture of steel anchor chains for vessels. The merchandise in the first importation consisted of a single machine, and the merchandise in the second importation consisted of five machines, with all six machines necessary to manufacture anchors. The Customs Court had held that the five machines were classifiable as an "entirety" with the earlier importation of the single machine. The Court of Customs and Patent Appeals reversed, stating that:

> To hold that the bulk of the equipment, imported in one shipment, is an entirety of unfinished apparatus and that the remaining element of that equipment, imported in a separate shipment, is a part of that entirety, would greatly compromise the doctrine of entireties. If that were the law, once it was determined that assembled pieces of equipment constitute an entirety, the mere absence of some of those pieces, even though essential ones, from the shipment would not preclude its treatment as an entirety since almost always it would be an entirety of "unfinished" apparatus and the missing pieces of equipment would be "parts" of that entirety. Clearly that is not the law. [Citations omitted] [59 CCPA at 126]

Clearly, on the basis of the above authorities, if an importation consists of some, but not all, pieces of unassembled marble fireplace kits (*e.g.*, if a complete unassembled kit consists of a header, riser, legs, and hearth, and the shipment is of a riser, legs, and hearth), classification of the pieces of marble is in the condition as imported, that is, as slabs of marble in subheading 6802.91.05, HTSUS, *provided that the pieces meet the definition of "slabs" in Additional U.S. Note 1, Chapter 68, HTSUS*. To rule otherwise (*e.g.*, in the preceding example, to treat the one importation of risers, legs, and hearths and another importation of headers as parts of complete unassembled fireplace kits, classified as other marble in subheading 6802.91.15, HTSUS) would be inconsistent with the basic classification principle that "* * * classification * * * must be ascertained by an examination of the imported article itself, in the condition in which it is imported" (*Citroen*, *supra*). Further, to rule otherwise "* * * would greatly compromise the doctrine of entireties" (*Baldt Anchor*, *supra*).

Pursuant to these same authorities, if there are any complete unassembled marble fireplace kits in an importation, such complete unassembled marble fireplace kits are classifiable as such (*i.e.*, pursuant to ruling HQ 955505, as other marble in subheading 6802.91.15, HTSUS). This is true no matter how they are packaged (*e.g.*, whether the pieces are packaged kit by kit, or separately by kind of piece). It is also true if an importation consists part-

ly of incomplete unassembled marble fireplace kits and partially of complete unassembled marble fireplace kits (*e.g.*, if an importation consists of 100 hearths and 10 complete unassembled marble fireplace kits). In the preceding example, the 100 hearths of marble would be classified in subheading 6802.91.05, HTSUS, as marble slabs (*provided* that the hearths meet the definition of "slabs" in Additional U.S. Note 1, Chapter 68, HTSUS), and the 10 complete unassembled marble fireplace kits would be classified in subheading 6802.91.15, as other marble. In this regard, see Customs Service Decision (C.S.D.) 92–11.

Holding:

When unassembled marble fireplace kits consisting of all of the pieces necessary to form a particular fireplace are imported in importations each of which contains only parts of the fireplace kits (*i.e.*, one or more, but not all, of the pieces of a fireplace kit are imported in one importation) and the pieces meet the definition of "slabs" in Additional U.S. Note 1, Chapter 68, HTSUS, the importations of pieces are classified as marble slabs under subheading 6802.91.05, HTSUS. If there are any complete unassembled marble fireplace kits in an importation, such complete unassembled marble fireplace kits are classifiable as other marble in subheading 6802.91.15, HTSUS, regardless of how the pieces in an importation are packed and regardless of whether an importation consists of either complete unassembled marble fireplace kits or in part of complete unassembled fireplace kits and in part of pieces of such kits.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 963321 AML
Category: Classification
Tariff No. 6802.91.05

MR. RICHARD H. ABBEY
MR. JOEL W. ROGERS
ABLONDI, FOSTER, SOBIN & DAVIDOW, P.C.
1150 Eighteenth Street
Ninth Floor
Washington, DC 20036–4129

Re: Marble slabs for fireplace surrounds; HQs 955505 revoked and 960617 modified.

DEAR MESSRS. ABBEY AND ROGERS:

This is in reference to Headquarters Ruling Letter (HQ) 955505, dated March 22, 1994, and HQ 960617, dated December 16, 1997, which concerned the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of marble fireplace surrounds (consisting of headers, footers, hearths, risers or legs) in subheading 6802.91.15, HTSUS. In HQ 955505, this office ruled that protest 1704–93–100338, which was filed on July 21, 1993 by Karen Geiger, on behalf of Intercontinental Marble Corp., should be denied. Descriptive literature was provided. In HQ 960617, which was issued to you in response to your April 29, 1997 letter, on behalf of Intercontinental Marble Corp., Customs clarified and upheld the decision made in HQ 955505. HQ 960617 noted that, should similar articles be entered which do not comprise an unassembled fireplace surround, those articles would be classified under subheading 6802.91.05, HTSUS, as marble slabs. In light of the stipulated judgments entered before the Court of International Trade in Court Nos. 94–10–00582 and 97–11–02013, we have reconsidered HQs 955505 and 960617 and now believe that those decisions are incorrect (although, of course, the specific liquidation and protest denial are not affected (see 19 U.S.C. 1514, 1515)). This proposed ruling sets forth the correct classification and the analysis therefor.

Facts:

The articles in HQ 955505 were described as follows:

> The marble fireplace surround[s] * * * are stone articles designed to fit into a fireplace. Each product is an unassembled article consisting of several pieces, *i.e.*, header, riser, legs and hearth, which form a special shape suited for a particular fireplace.

The articles were similarly described in HQ 960617, which analyzed in detail the decision reached in HQ 955505.

Issue:

Whether the marble fireplace surrounds are classified under subheading 6802.91.05, as marble slabs, or under subheading 6802.91.15, HTSUS, as other articles of marble?

Law and Analysis:

The classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes. GRI 6 provides that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, by appropriate substitution of terms, to GRIs 1 through 5, on the understanding that only subheadings at the same level are comparable.

The 1999 HTSUS heading and subheadings under consideration are as follows:

6802	Worked monumental or building stone (except slate) and articles thereof, other than goods of heading 6801; mosaic cubes and the like, of natural stone (including slate), whether or not on a backing; artificially colored granules, chippings and powder, of natural stone (including slate):
	Other:
6802.91	Marble, travertine and alabaster:
	Marble:
6802.91.05	Slabs:
6802.91.15	Other.

In HQ 955505, Customs rejected the protestant's contention that the articles, marble fireplace surrounds (consisting of headers, footers, hearths, risers or legs), were classifiable as marble slabs under subheading 6802.91.05, HTSUS. Customs reasoned that because the articles were, in their condition as imported, designed to function as and comprise a complete fireplace surround, the marble slabs were classifiable as other articles of marble under subheading 6802.91.15, HTSUS. That is, by operation of GRI 1, Customs determined that the articles were classifiable under subheading 6802.91, as marble. Pursuant to GRI 6, the remaining GRIs were applied in order to determine which subheading best described the articles as imported. We reasoned that because the marble slabs were installed together to form a uniquely shaped fireplace surround, they comprised an unassembled article and were therefore classifiable as marble other than in slab form.

In HQ 960617, we reaffirmed the determination made in HQ 955505. We reasoned that when the component articles of a fireplace surround are imported together, they are classifiable as an unfinished or unassembled fireplace surround—an article other than marble slabs and therefore classifiable in subheading 6802.91.15, HTSUS. HQ 960617 further held that depending on the "shipment configuration" within which the articles would be imported, the articles would be classified as marble slabs under subheading 6802.91.05, HTSUS. The prospective shipment configurations were described in HQ 960617 as shipments that would consist of marble slabs of a single size to be used as headers, footers, hearths, risers or legs; shipments of mixed pieces, not arranged and packaged as unassembled surrounds; and shipments of pieces arranged in matched, unassembled, but incomplete surrounds (*i.e.*, each shipment would consist of matched marble slabs, but no group of slabs would contain all the pieces necessary to frame a fireplace).

Customs analyzed the classification of the articles imported in these configurations by applying several long-standing principles related to classification, by application of Additional U.S. Note 1 to Chapter 68, and after considering the holdings of two prior rulings. HQ 960617 restated the long-standing rule that an article is to be classified according to its condition as imported. See, *XTC Products, Inc. v. United States*, 771 F.Supp. 401, 405 (1991). See also, *United States v. Citroen*, 223 U.S. 407 (1911). We also restated the rule derived from *United States v. Baldt Anchor, Chain & Forge Division of Boston Metals Co.*, 59 CCPA

122, C.A.D. 1051, 429 F.2d 1403 (1972), and *Franklin Industries, Inc. v. United States*, 1 CIT 349, Slip Op. 81–55 (1981), in which the courts held that to enjoy classification under a single tariff item number, all components necessary to the completion of a particular article must be imported in the same shipment.

Additionally, Customs addressed the effect of Additional U.S. Note 1, Chapter 68, HTSUS (see below), and of HQs 952678, dated December 30, 1992, and HQ 951047, dated September 17, 1992. In HQs 952678 and 951047, Customs held that under the definition provided in Additional U.S. Note 1, Chapter 68, HTSUS, pieces of marble the edges of which were cut more deeply or more widely than 1/32 of an inch were considered to have been "beveled, rounded or otherwise processed" to a greater extent than that needed to facilitate installation. Such pieces were held not to meet the definition of "slabs" of Additional U.S. Note 1, Chapter 68, HTSUS.

Customs has reconsidered its position, and now holds that upon importation, marble headers, footers, hearths, risers or legs for fireplace surrounds, provided they satisfy the criteria provided in Additional U.S. Note 1, Chapter 68, HTSUS, are classifiable in subheading 6802.91.05, HTSUS, as marble slabs.

The marble fireplace surrounds at issue are clearly classifiable under subheading 6802.91, HTSUS, as marble. The issue to be determined is whether the articles are slabs pursuant to Additional U.S. Note 1, Chapter 68, HTSUS, which states:

> For the purposes of heading 6802, the term "slabs" embraces flat stone pieces, not over 5.1 cm in thickness, having a facial area of 25.8 cm^2 or more, the edges of which have not been beveled, rounded or otherwise processed except such processing as may be needed to facilitate installation as tiling or veneering in building construction.

Additional U.S. Note 1 begins "for the purposes of heading 6802 * * *". In heading 6802, HTSUS, the term "slabs" is used as a subheading under the basket provision for "other" worked monumental or building stone. It does not occur elsewhere in the heading. A careful reading of the U.S. Note, and a comparison of the subheadings at the same (8-digit) level clearly shows that the distinction to be made between "slabs" of heading 6802.91.05, HTSUS, and "other" articles of 6802.91.15, HTSUS, is that of the degree of working or processing to which the articles have been subjected. Such a distinction, based on the degree of work performed, is further evidenced by the terms of other subheadings under 6802, HTSUS (See, *e.g.*, subheading 6802.91.20, HTSUS). The result is that "slabs," as defined in Additional U.S. Note 1, are classified separately from monumental or building stone that has been subjected to substantial working or processing.

When interpreting and implementing the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. Customs believes the ENs should always be consulted. See, T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to heading 6802, HTSUS, provide, in pertinent part, that:

> This heading covers natural monumental or building stone (except slate) which has been worked beyond the stage of the normal quarry products of Chapter 25[.]
>
> * * * * * * *
>
> The heading therefore covers stone, which has been further processed than mere shaping into blocks, sheets or slabs by splitting, roughly cutting or squaring, or squaring by sawing (square or rectangular faces).
>
> The heading thus covers stone in the forms produced by the stonemason, sculptor, etc., viz.:
>
> * * * * * * *
>
> (B) Stone of any shape (including blocks, slabs or sheets), whether or not in the form of finished articles, which has been * * * planed, sand dressed, ground, polished, chamfered, moulded, turned, ornamented, carved, etc.
>
> The heading therefore includes not only constructional stone *(including facing slabs)* worked as above, but also articles such as * * * door or window frames and lintels * * * *mantelpieces* * * * etc. (Emphasis added).
>
> * * * * * * *
>
> Stone slabs forming the tops of articles of furniture (sideboards, washstands, tables, etc.) are classified in Chapter 94 if presented with the pieces of furniture (whether or

not assembled) and clearly intended as parts thereof, but *such furniture tops presented separately remain in this heading* [emphasis added].

The articles, as entered, are slabs of marble which conform to the size restrictions delineated by Additional U.S. Note 1 to Chapter 68 and to the preliminary criteria established in the EN ("stone, which has been further processed than mere shaping into blocks, sheets or slabs by splitting, roughly cutting or squaring, or squaring by sawing (square or rectangular faces)").

Evidence was presented before the CIT that indicated that the articles in Court Nos. 94–10–00582 and 97–11–02013 are not regularly imported as unfinished surrounds. The marble headers, footers, hearths and risers or legs are designed, worked into and intended to be used as marble headers, footers, hearths and risers or legs; completely surrounding a fireplace opening when used in combination, independently (a single hearth, for example), or in any conceivable combination thereof. The marble slabs are imported in the various configurations provided above. The articles are not ready for immediate installation upon importation; rather, the articles are imported cut to general dimensions and must be further worked (trimmed to specific size) prior to final installation.

Finally, there is no "assembly" of the surrounds. The marble slabs are not joined by fasteners, do not permanently interlock to form a single whole, and do not comprise a single article for classification purposes. The various marble slabs (headers, footers, hearth, risers or legs) are arranged around a fireplace for aesthetic purposes according to the desired effect of the installer. The installation of any of the articles is not dependent upon the installation of the others; the individual articles are simply glued to the wall around a fireplace opening (sometimes referred to as a "firebox"). Thus, although the articles can be matched and installed by the color and pattern of stone, any of the articles can be installed independently of the others. As such, we no longer consider such articles upon importation to be unassembled surrounds. Upon importation, provided the articles comply with the edicts of Additional U.S. Note 1, Chapter 68, HTSUS (see above), and HQs 952678 and HQ 951047, the articles are classifiable under subheading 6802.91.05, HTSUS.

Holding:

The marble fireplace surrounds (designated headers, risers, legs and hearths) are classified under subheading 6802.91.05, as marble slabs.

Effect on Other Rulings:

HQ 955505, dated March 22, 1994, is REVOKED and HQ 960617, dated December 16, 1997, is MODIFIED.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 963766 AML
Category: Classification
Tariff No. 6802.91.05

MS. PAM BROWN
CARGO U.K., INC.
4790 Aviation Parkway
Atlanta, GA 30349

Re: Marble slabs for fireplace surrounds; HQ 960495 revoked.

DEAR MS. BROWN:

This is in reference to Headquarters Ruling Letter (HQ) 960495, dated December 12, 1997, which concerned the classification, under the Harmonized Tariff Schedule of the

United States (HTSUS), of marble fireplace surrounds (consisting of headers, footers, hearths, risers or legs) in subheading 6802.91.15, HTSUS. In light of the stipulated judgments entered before the Court of International Trade in Court Nos. 94–10–00582 and 97–11–02013, we have reconsidered HQ 960495 and now believe that it is incorrect. This proposed ruling sets forth the correct classification and the analysis therefor.

Facts:

The articles in HQ 960495 were described as follows:

> The merchandise is described as "[m]arble fireplace kits (unassembled)" and specifications are provided. The merchandise is described as "TAIWAN GREEN" and is stated to have been quarried in Taiwan. According to material you submitted, the pieces of stone making up the kits are polished on both sides. No other information was provided. For purposes of this ruling, we assume that the fireplace kits consist of all of the pieces necessary to form a special shape suited for a particular fireplace, that the pieces are specially cut to size, and that the edges of the pieces have not been beveled, rounded or otherwise processed except to the degree needed to facilitate installation.

Issue:

Whether the marble fireplace surrounds are classified under subheading 6802.91.05, as marble slabs, or under subheading 6802.91.15, HTSUS, as other articles of marble?

Law and Analysis:

The classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRIs), taken in order. GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes. GRI 6 provides that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, by appropriate substitution of terms, to GRIs 1 through 5, on the understanding that only subheadings at the same level are comparable.

The 1999 HTSUS heading and subheadings under consideration are as follows:

6802	Worked monumental or building stone (except slate) and articles thereof, other than goods of heading 6801; mosaic cubes and the like, of natural stone (including slate), whether or not on a backing; artificially colored granules, chippings and powder, of natural stone (including slate):
	Other:
6802.91	Marble, travertine and alabaster:
	Marble:
6802.91.05	Slabs:
6802.91.15	Other.

In HQ 960495, after determining that the marble could not be classified in heading 2515, HTSUS, as roughly trimmed or merely cut building stone, Customs reasoned that because the articles, marble fireplace surrounds (consisting of headers, footers, hearths, risers or legs), were, in their condition as imported, designed to function as and comprise a complete fireplace surround, the marble slabs were classifiable as other articles of marble under subheading 6802.91.15, HTSUS. That is, by operation of GRI 1, Customs determined that the articles were classifiable under subheading 6802.91, as marble. Pursuant to GRI 6, the remaining GRIs were applied in order to determine which subheading best described the articles as imported. We reasoned that because the articles were installed together to form a uniquely shaped fireplace surround, they comprised an unassembled article and were therefore classifiable as marble other than in slab form.

In HQ 960495, Customs analyzed the classification of these articles by considering the effect of several prior rulings and by application of Additional U.S. Note 1 to Chapter 68 (see below). Initially, Customs relied on the holding made in HQ 955505, dated March 22, 1994. Customs has proposed to revoke HQ 955505 in HQ 963321, issued on the date of this ruling. Customs further relied upon HQs 952678, dated December 30, 1992, and HQ 951047, dated September 17, 1992. In HQs 952678 and 951047, Customs held that under the definition provided in Additional U.S. Note 1, Chapter 68, HTSUS, pieces of marble the edges of which were cut more deeply or more widely than 1/32 of an inch were considered to have been "beveled, rounded or otherwise processed" to a greater extent than that needed to facilitate installation. Such pieces were held not to meet the definition of "slabs" of Additional U.S. Note 1, Chapter 68, HTSUS.

Customs has reconsidered its position, and now holds that marble headers, footers, hearths, risers or legs, provided they satisfy the criteria provided in Additional U.S. Note 1, Chapter 68, HTSUS, are classifiable in subheading 6802.91.05, HTSUS, as marble slabs.

The marble fireplace surrounds are clearly classified under subheading 6802.91, HTSUS, as marble. The issue to be determined is whether the articles are slabs pursuant to Additional U.S. Note 1, Chapter 68, HTSUS, which states:

> For the purposes of heading 6802, the term "slabs" embraces flat stone pieces, not over 5.1 cm in thickness, having a facial area of 25.8 cm^2 or more, the edges of which have not been beveled, rounded or otherwise processed except such processing as may be needed to facilitate installation as tiling or veneering in building construction.

Additional U.S. Note 1 begins "for the purposes of heading 6802 * * *". In heading 6802, HTSUS, the term "slabs" is used as a subheading under the basket provision for "Other" worked monumental or building stone. It does not occur elsewhere in the heading. A careful reading of the U.S. Note, and a comparison of the subheadings at the same (8-digit) level clearly shows that the distinction to be made between "slabs" of heading 6802.91.05, HTSUS, and "other" articles of 6802.91.15, HTSUS, is that of the degree of working or processing to which the articles have been subjected. Such a distinction, based on the degree of work performed, is further evidenced by the terms of other subheadings under 6802, HTSUSA (See, *e.g.*, subheading 6802.91.20, HTSUSA). The result is that "slabs", as defined in Additional U.S. Note 1, are classified separately from monumental or building stone that has been subjected to substantial working or processing.

When interpreting and implementing the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. Customs believes the ENs should always be consulted. See, T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to heading 6802, HTSUS, provide, in pertinent part, that:

> This heading covers natural monumental or building stone (except slate) which has been worked beyond the stage of the normal quarry products of Chapter 25[.]
>
> * * * * * * *
>
> The heading therefore covers stone, which has been further processed than mere shaping into blocks, sheets or slabs by splitting, roughly cutting or squaring, or squaring by sawing (square or rectangular faces).
>
> The heading thus covers stone in the forms produced by the stonemason, sculptor, etc., viz.:
>
> * * * * * * *
>
> (B) Stone of any shape (including blocks, slabs or sheets), whether or not in the form of finished articles, which has been * * * planed, sand dressed, ground, polished, chamfered, moulded, turned, ornamented, carved, etc.
>
> The heading therefore includes not only constructional stone *(including facing slabs)* worked as above, but also articles such as * * * door or window frames and lintels * * * *mantelpieces* * * * etc. (Emphasis added).
>
> Stone slabs forming the tops of articles of furniture (sideboards, washstands, tables, etc.) are classified in Chapter 94 if presented with the pieces of furniture (whether or not assembled) and clearly intended as parts thereof, but *such furniture tops presented separately remain in this heading* [emphasis added].

The articles, as entered, are slabs of marble which conform to the size restrictions delineated by Additional U.S. Note 1 to Chapter 68 and to the preliminary criteria established in the EN ("stone, which has been further processed than mere shaping into blocks, sheets or slabs by splitting, roughly cutting or squaring, or squaring by sawing (square or rectangular faces)").

Evidence was presented before the CIT that indicated that the articles in Court Nos. 94–10–00582 and 97–11–02013 are not regularly imported as unfinished surrounds. The marble headers, footers, hearths and risers or legs are designed, worked into and intended to be used as marble headers, footers, hearths and risers or legs; completely surrounding a fireplace opening when used in combination, independently (a single hearth, for example), or in any conceivable combination thereof. The marble slabs are imported in the various configurations provided above. The articles are not ready for immediate installation upon importation; rather, the articles are imported cut to general dimensions and must be further worked (trimmed to specific size) prior to final installation.

Finally, there is no "assembly" of the surrounds. The marble slabs are not joined by fasteners, do not permanently interlock to form a single whole, and do not comprise a single article for classification purposes. The various marble slabs (headers, footers, hearth, risers or legs) are arranged around a fireplace for aesthetic purposes according to the desired effect of the installer. The installation of any of the articles is not dependent upon the installation of the others; the individual articles are simply glued to the wall around a fireplace opening (sometimes referred to as a "firebox"). Thus, although the articles can be matched and installed by the color and pattern of stone, any of the articles can be installed independently of the others. As such, we no longer consider the importation of such articles to be unassembled surrounds. Upon importation, provided the articles comply with the edicts of Additional U.S. Note 1, Chapter 68, HTSUS (see above), and HQs 952678 and HQ 951047, the articles are classifiable under subheading 6802.91.05, HTSUS.

Holding:

The marble fireplace surrounds (designated headers, footers, hearths, risers or legs) are classified under subheading 6802.91.05, as marble slabs.

Effect on Other Rulings:

HQ 960495, dated December 12, 1997, is REVOKED.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF SUITCASE COMPONENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of and treatment relating to tariff classification of suitcase components.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to revoke rulings pertaining to the tariff classification of suitcase components and to revoke any treatment previously accorded by Customs to substantially identical merchandise.

DATE: Comments must be received on or before April 21, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Textile Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, 1300 Pennsylvania Avenue, N.W., Washington D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Textile Branch (202) 927–2302.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that, in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. § 1625(c)(1)), this notice advises interested parties that Customs intends to revoke three ruling letters pertaining to the tariff classification of suitcase components. Although in this notice Customs is specifically referring to three rulings, those being Headquarters Ruling Letters (HQ) 089289, HQ 951183, and New York Ruling Letter (NY) 818857, this notice covers any rulings relating to the specific issue of tariff classification set forth in the rulings, which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the three identified. No additional rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, an internal advice memorandum or decision, or a protest review decision) on the issue subject to this notice, should advise Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. § 1625(c)(2)), Customs intends to revoke any treatment previously accorded by the Customs Service for substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar issue, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in the classification of substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise, or of a specific ruling not identified in this notice, may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of the final decision on this notice.

In HQ 089289, issued December 9, 1991, a luggage component described as "the bottom half of a pullman suitcase" was classified in sub-

heading 4202.19.0000, HTSUSA, the provision for "Trunks, suitcases * * * and similar containers * * *: Trunks, suitcases * * *: With outer surface of plastics or of textile materials: Other." In HQ 951183, issued June 16, 1992, this office reconsidered and affirmed HQ 089289. In NY 818857, issued February 16, 1996, luggage components described as "the left and right sides of a vertical suitcase," each imported in separate shipments, were classified in subheading 4202.12.8070, HTSUSA, textile category 670, the provision for "Trunks, suitcases * * * and similar containers * * *: Trunks, suitcases * * *: With outer surface of plastics or of textile materials: With outer surface of textile materials: Other, Other: Other: Of man-made fibers." HQ 089289, HQ 951183, and NY 818857, are set forth as "Attachment A," "Attachment B," and "Attachment C" to this document, respectively.

The sample classified in HQ 089289 and HQ 951183 is described as the bottom half of a pullman suitcase, made of a vinyl-backed nylon material, measuring approximately 31 inches by 24 inches, with an expandable maximum width of 9 inches. The component had a rigid edge, corner piping, a carrying handle, inner straps for retaining clothing, outer straps for reinforcement, a rigid bottom flap with fixtures for the attachment of wheels, and a half zipper sewn around an outside edge. A sample of the top half of the pullman suitcase, although separately imported and not at issue in either of the rulings, was submitted for examination and was found to have the same material composition (as the bottom half), a corresponding half zipper, and a full-width zippered exterior pocket. It was noted that the straps and hardware included on the submitted samples would be imported separately from the top and bottom halves of the suitcase, that post-importation assembly would essentially involve attaching hardware, sewing, and riveting, and that the costs of the bottom, top, and hardware components were approximately 47 percent, 43 percent, and 10 percent of the total costs of the suitcase, respectively.

The samples classified in NY 818857 are identified as the separately imported left and right sides of a vertical suitcase. The samples are described as having an outer surface composition of man-made textile materials. One of the sides is said to be complete with utility pockets.

Each individual component is entered in a shipment separately from any other component(s) with which it could otherwise be assembled after importation to form an article having the essential character of a complete or finished article, and which, pursuant to GRI 2(a), might otherwise be classifiable as that complete or finished article. None of the imported components, standing alone, possesses the essential character of the heading 4202 exemplars, articles whose essential characteristics and purposes are to organize, store, protect and carry various items. One half of a suitcase comprises only a part of a suitcase. Since no provision under heading 4202, HTSUSA, provides for "parts" of the articles classifiable in the heading, it is Customs position that none of the separately imported suitcase components is an incomplete article

which has the essential character of, and is classifiable as, a complete or finished suitcase. The separately imported, individual components are classifiable under heading 6307, HTSUSA, as "Other made up [textile] articles."

Pursuant to 19 U.S.C. § 1625(c)(1), Customs intends to revoke HQ 089289, HQ 951183, and NY 818857, and any other rulings not specifically identified which involve identical or substantially identical merchandise, to reflect the proper classification of the suitcase components according to the analysis in Proposed Headquarters Ruling Letters (HQ) 963486 and HQ 959015, which are set forth as "Attachments D and E" to this document. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), Customs intends to revoke any treatment that Customs may have previously accorded to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: March 3, 2000.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, December 9, 1991.

CLA–2 CO:R:C:T 089289 JS
Category: Classification
Tariff No. 4202.19.0000

ROBERT L. FOLLICK
FOLLICK & BESSICH, P.C.
225 Broadway
New York, NY 10007

Re: Luggage component; classifiable heading 4202, HTSUSA.

DEAR MR. FOLLICK:

This is in reference to your letter of May 1, 1991, on behalf of International Travel System, requesting classification of luggage components under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Facts:

The sample provided for our inspection is a bottom half of a pullman suitcase. It is made of a vinyl backed nylon material and measures approximately 31 x 24 inches, with an expandable maximum width of 9 inches. The component appears to be complete and in a condition ready to be joined to the lid portion of the finished suitcase; it has rigid edge and corner piping, a carrying handle securely affixed to the top, reinforcing straps sewn lengthwise onto the outside, inner straps for holding clothing into place, a rigid bottom flap with plastic fixtures for the attachment of wheels, and a half zipper sewn around the appropriate edge. The final assembly would require only the sewing and riveting of the top shell onto this bottom.

Pursuant to our request for additional information, you stated that the top half of the unassembled luggage is virtually identical in composition to the bottom half presented for

inspection. The two sections differ only in the presence of a gusset and a wire frame in the lower component. Moreover, the cost and manufacturing time for each component is also nearly identical: your client indicated that the cost of the bottom half is approximately 47 percent of the total cost; the top half comprises approximately 43 percent of the total cost, and the hardware makes up 10 percent of the final cost of the product.

Issue:

Whether the bottom half of a suitcase which is complete but for the attachment of the remaining half, is considered an incomplete or unassembled item classifiable as luggage pursuant to GRI 2(a), or whether it must be classified as an other made up article under heading 6307, HTSUSA.

Law and Analysis:

Classification of merchandise under the HTSUSA is in accordance with the General Rules of Interpretation (GRI), taken in order. GRI 1 provides that the classification shall be determined according to the terms of the headings and any relevant section or chapter notes.

GRI 2(b) states that

> [a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

Heading 4202 provides for luggage, including suitcases, traveling bags, and similar articles, of leather, plastics or textile materials. It is clear that the article at issue is, in every respect, a luggage component. This component has the essential character of the finished article, including the straps, handle and trim. The only part required for completion of the article is the lid portion with its zipper counterpart. As such is the case, we consider this merchandise to be incomplete or unfinished luggage in accordance with GRI 2(b). Since heading 4202 specifically provides for luggage, classification therein is appropriate.

Heading 6307, which provides for other made up articles, is a residual category considered only in the absence of a more specific heading, see GRI 3(a).

Holding:

The merchandise at issue is properly classified under subheading 4202.19.0000, HTSUSA, which provides for trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of plastic sheeting, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels and similar containers:
>
> With outer surface of plastics or of textile materials:
>
> With outer surface of textile materials:
>
> Other. * * * 20 percent ad valorem

Due to the changeable nature of the statistical annotation and the restraint (quota/visa) categories applicable to textile merchandise, your client should contact its local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 16, 1992.

CLA-2 CO:R:C:T 951183 CAB
Category: Classification
Tariff No. 4202.19.0000

ROBERT L. FOLLICK, ESQ.
GIBNEY, ANTHONY & FLAHERTY
665 Fifth Avenue
New York, NY 10022-5305

Re: Reconsideration of HRL 089289; classification of luggage components; classifiable in Heading 4202.

DEAR MR. FOLLICK:

This letter is in response to your request, on behalf of International Travel System of New Jersey, Ltd., for reconsideration of Headquarters Ruling Letter (HRL) 089289, dated December 9, 1991, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), concerning the tariff classification of unfinished textile luggage.

Facts:

The sample you initially provided was a bottom component of a pullman suitcase. The top flap of a pullman suitcase was submitted separate from the bottom component. The top flap contains a half zipper sewn around the outside edge. The top flap also has an outside pocket the width of the entire top flap that contains a zipper as a means of closure. The pocket is designed for toting miscellaneous smaller items. Each article is made of a vinyl backed woven nylon material. The bottom component measures approximately 31 x 24 inches, with an expandable maximum width of 9 inches. The bottom component appears to be complete and in a condition ready to be joined to the lid portion of the finished suitcase; it has rigid edge and corner piping, a carrying handle securely affixed to the top, reinforcing straps sewn lengthwise onto the outside, inner straps for holding clothing into place, a rigid bottom flap with plastic fixtures for the attachment of wheels, and a half zipper sewn around the appropriate edge. The top portion and the bottom portion of the suitcase will be imported separately. Also the straps which are attached to each sample piece, and the hardware which accompanied the sample bottom portion will be imported separately and at different times. The final assembly would require sewing and riveting of the top shell onto the bottom, sewing the straps on both the top portion and the bottom portion, and attaching the hardware onto the plastic fixtures. You assert that the manufacturing time for each article is approximately the same. You also indicate that the cost of the bottom component is approximately 47 percent of the total cost; the top flap constitutes approximately 43 percent of the total cost, and the hardware makes up 10 percent of the final cost of the product.

Issue:

Whether top and bottom luggage components have the essential character of finished luggage in order to be considered incomplete or unassembled items classifiable as luggage in Heading 4202, HTSUSA, or whether the items are classifiable as other made up articles in Heading 6307, HTSUSA?

Law and Analysis:

Classification of merchandise under the HTSUSA is in accordance with the General Rules of Interpretation (GRIs), taken in order. GRI 1 provides that "classification shall be determined according to the terms of the headings and any relevant Section or Chapter notes." Merchandise that cannot be classified in accordance with GRI 1 are to be classified in accordance with subsequent GRI's, taken in order.

GRI 2(a) provides the following:

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

The Explanatory Notes (EN) to the HTSUSA constitute the official interpretation of the tariff at the international level. The EN to GRI 2(a) states in pertinent part:

> (II) The provisions of this Rule also apply to blanks unless these are specified in a particular heading. The term "blank" means an article, not ready for direct use, having the approximate shape or outline of the finished article or part, and which can only be used, other than in exceptional cases, for completion into the finished article or part.
>
> * * * * * * *
>
> (VII) For the purposes of this Rule, "articles presented unassembled or disassembled" means articles the components of which are to be assembled either by means of simple fixing devices (screws, nuts, bolts, etc.) or by riveting or welding, for example, provided only simple assembly operations are involved.

Heading 4202 provides for luggage, including suitcases, traveling bags, and similar articles, of leather, plastics or textile materials. In this instance, the top lid as imported will include the handle and trim, a half zipper that surrounds the edges of the lid, and an outside pocket. The bottom component as imported will contain a half zipper that surrounds its edges, handle, a bottom flap, and the plastic fixtures necessary to attach the top component to the bottom component. Given the general appearance of each of the sample pieces, and the fact that neither piece is functional without the other, it is clear each piece has the essential character of unfinished luggage.

When examining the sample articles in light of the EN to GRI 2(a), again, they seem to constitute unassembled goods. The EN focus on the degree of assembly necessary to make the component parts whole. The EN emphasize that the simpler the assembly process, the more likely the articles should be deemed unassembled goods. In this instance, there is very little post importation processing required to transform the components into a single piece of luggage. It is clear that the component parts are substantially complete, and the simple procedures necessary for completion is attaching the top portion of the article to the bottom portion of the article, sewing the straps onto each component, and attaching the hardware to each component.

You cite Glass Prd. Inc. v. U.S., 10 CIT 253, 641 F. Supp. 813 (1986), to substantiate your claim that the submitted samples should be classified separately as component parts, and not as a substantially complete article. You contend that Glass Prd. Inc. determines that an eo nomine provision covers all forms of an article but does not cover a part of the article unless the tariff provision specifically provides for parts. However, this case is not persuasive in this instance since it is based on General Interpretative Rule 10(h) of the Tariff Schedules of the United States (TSUS) which was replaced by the HTSUSA. Therefore, in this instance, GRI 2(a) of the HTSUSA is applicable in determining whether merchandise is sufficiently complete due to its essential character to warrant classification as a complete article.

You assert that Delco Electronics Div. General Motors Corp v. United States, 11 CIT 661 (1987), represents the prevailing case law that establishes the criteria to determine what makes an article substantially complete based on an interpretation of Rule 10(h), TSUS. This criteria was originally listed in Daisy-Heddon, Division of Victor Comptometer Corp. v. United States, 81 Cust. Ct. 55, C.D. 4765 (1978), aff'd, 66 CCPA 97 (1979). In Headquarters Ruling Letter (HRL) 081623 of May 18, 1989, Customs determined that cases which construe Rule 10(h) such as Daisy-Heddon are not relevant to the interpretation of GRI 2(a), and that GRI 2(a) is controlling.

It is your contention that the top portion, the bottom portion, the hardware and straps, will all be imported separately. The fact that the components will be imported separately has no impact on the applicable classification of the bottom portion and the top portion. Without the loose hardware and the straps, each component continues to be recognizable as an unfinished piece of luggage. There is no complex post importation assembly necessary. Consequently, the bottom component and the top component are both classifiable as unfinished luggage in Heading 4202.

Holding:

The two components forming the suitcase, if imported separately, are each properly classifiable in subheading 4202.19.0000, HTSUSA, which provides for trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases,

jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of plastic sheeting, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials. The applicable rate of duty is 20 percent ad valorem.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, February 16, 1996.

CLA–2–42:RR:NC:WA:341 818857
Category: Classification
Tariff No. 4202.12.8070

MR. ROBERT L. FOLLICK, ESQ.
FOLLICK & BESSICH, P.C.
ATTORNEYS AT LAW
225 Broadway, Suite 500
New York, NY 10007

Re: The tariff classification of unfinished luggage from Korea, China and/or Sri Lanka.

DEAR MR. FOLLICK:

In your letter dated January 29, 1996, on behalf of Seil Co., Ltd. of Korea, you requested a classification ruling for unfinished luggage. You have requested a classification of articles described as luggage components. The samples submitted are the left and right sides of a vertical suitcase. The article said to be the top side is complete with utility pockets. Each sample is said to be imported in separate shipments. The articles each consist of an outer surface of man-made textile materials.

Classification for this type of merchandise is subject to GRI 2. GRI 2(b) states that any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled. We consider this merchandise to be incomplete or unfinished luggage in accordance with GRI 2(b). Since heading 4202 specifically provides for luggage, classification therein is appropriate.

Your samples are being returned as you requested.

The applicable subheading for the unfinished luggage of man-made textile material will be 4202.12.8070, Harmonized Tariff Schedule of the United States (HTS), which provides for trunks, suitcases, vanity cases and similar containers, with outer surface of plastics or of textile materials, other, other, of man-made fibers. The duty rate will be 19.5 percent ad valorem.

Items classifiable under 4202.12.8070 fall within textile category designation 670. Based upon international textile trade agreements products of Korea, China and Sri Lanka are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kevin Gorman at 212–466–5893.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 963486 GGD
Category: Classification
Tariff No. 6307.90.9989

ROBERT L. FOLLICK, ESQUIRE
FOLLICK & BESSICH, P.C.
513 West Mount Pleasant Avenue, Suite 205
Livingston, NJ 07039

Re: Revocation of HQ 089289 and HQ 951183; Suitcase Component; Not incomplete article with essential character of complete or finished suitcase; GRI 2(a); Headings 4202 and 6307; *Totes, Incorporated v. United States*, 18 C.I.T. 919, 865 F. Supp. 867 (1994), aff'd 69 F.3d 495 (Fed. Cir. 1995).

DEAR MR. FOLLICK:

In Headquarters Ruling Letter (HQ) 089289, issued to you December 9, 1991, on behalf of International Travel System of New Jersey, Ltd. (ITS), a luggage component described as "the bottom half of a pullman suitcase" was classified in subheading 4202.19.0000, HTSUSA, the provision for "Trunks, suitcases * * * and similar containers * * *: Trunks, suitcases * * *: With outer surface of plastics or of textile materials: Other." You subsequently requested reconsideration of that ruling. In HQ 951183, issued to you June 16, 1992, on behalf of ITS, this office reconsidered and affirmed HQ 089289. We have since reviewed both HQ 089289 and HQ 951183 and have found the rulings to be in error. Therefore, this ruling revokes HQ 089289 and HQ 951183.

Facts:

The sample suitcase component at issue in HQ 089289 and HQ 951183, is described in the rulings as being made of a vinyl-backed nylon material, and measuring approximately 31 inches by 24 inches, with an expandable maximum width of 9 inches. The article had a rigid edge, corner piping, a carrying handle, inner straps for retaining clothing, outer straps for reinforcement, a rigid bottom flap with fixtures for the attachment of wheels, and a half zipper sewn around an outside edge.

A sample of the top half of the pullman suitcase, although separately imported and not at issue in either of the rulings, was submitted for examination prior to the issuance of HQ 951183. That component was found to have the same material composition (as the bottom half), a corresponding half zipper, and a full-width, zippered exterior pocket. It was also noted that the straps and hardware included with the submitted samples would be imported separately from the top and bottom halves of the suitcase, that post-importation as-

sembly would essentially involve attaching hardware, sewing, and riveting, and that the costs of the bottom, top, and hardware components were approximately 47 percent, 43 percent, and 10 percent of the total costs of the suitcase, respectively.

Issues:

1) Whether the separately imported component part of a finished suitcase possesses the essential character of a complete or finished suitcase classifiable under heading 4202, HTSUSA.

2) Whether separately shipped, corresponding component parts of a finished suitcase (e.g., a top half and a bottom half) can be aggregated so that each separately imported component is classifiable as a complete or finished article.

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Heading 4202, HTSUSA, covers "Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper."

As noted above, classification is made in accordance with the GRI and the terms of the headings with the guidance of the EN to understand the scope of the headings and GRI. Since the bottom half of a suitcase, standing alone, is not a named exemplar of heading 4202, nor similar to any of the complete, fully functional containers named therein, the article cannot be classified pursuant to GRI 1 alone, i.e., according to the terms of the heading. We therefore look to GRI 2(a), which states:

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

EN (I) and (VI), to GRI 2(a), are particularly helpful in understanding the scope of GRI 2(a) as it applies to the imported merchandise. The EN contain the following guidance:

> (I) The first part of Rule 2(a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished, **provided** that, as presented, it has the essential character of the complete or finished article.
>
> (VI) This Rule also applies to incomplete or unfinished articles presented unassembled or disassembled provided that they are to be treated as complete or finished articles by virtue of the first part of this Rule.

Since the imported merchandise is one half of a suitcase, it is an incomplete article. Therefore, the first part of GRI 2(a) is the part of the rule that is most pertinent to the facts of this case. In HQ 089289 and HQ 951183, one half of a suitcase was classified under heading 4202, HTSUSA, by finding that the incomplete article, as presented, had the essential character of the complete or finished article. It appears in the rulings, however, that merchandise not shipped with the individual component, i.e., the absent top half of the suitcase, was erroneously considered to be present at importation and, in light of undemanding post-importation assembly processes, classified as a substantially complete article entered unassembled. HQ 951183 contains a cite to EN (VII). EN (VII), however, provides guidance as to the second part of GRI 2(a), which concerns the importation of articles that are "* * * complete or finished * * * entered unassembled or disassembled" and the means by which such articles are assembled after importation. The imported merchandise at issue here is

not complete or finished and does not include components which may be assembled into a complete article.

In determining whether the subject bottom half of a suitcase possesses the essential character of a complete or finished suitcase, we look to the judicial guidance provided in *Totes, Incorporated v. United States*, 18 C.I.T. 919, 865 F. Supp. 867 (1994), aff'd 69 F.3d 495 (Fed. Cir. 1995). In *Totes*, the Court of International Trade (CIT) held that the essential characteristics and purposes of the heading 4202 exemplars are to organize, store, protect and carry various items. Unlike suitcases and all of the other exemplars enumerated in heading 4202, HTSUSA, the half suitcase under consideration here is not able to organize, store, protect, or carry items.

In HQ 956538, issued November 29, 1994 (before the CIT's holding in the *Totes* case had been affirmed by the Court of Appeals for the Federal Circuit), this office discussed the first part of GRI 2(a), and found that the front panel assembly for a suitcase did not possess the essential character of the complete article. We construed the term "essential character" to mean "the attribute which strongly marks or serves to distinguish what an article is; that which is indispensable to the structure, core or condition of the article." We found that the front panel was no more important to the finished article than the absent walls and rear panel. The front panel assembly was classified in subheading 6307.90.9989, HTSUSA.

In HQ 958773, issued July 29, 1996, we considered the classification of incomplete or unfinished cases that would be fitted, after importation, to hold compact discs (CDs). The protestant had claimed that the merchandise should be classified in subheading 6307.90.9989, HTSUSA, because the cases were imported without the CD-holding, plastic inserts (that would be affixed after importation), and therefore did not have the essential character of finished CD cases. We noted that, despite the absence of the special inserts, the cases, as imported, were designed and dedicated to function as carrying cases that provided a secure, foam-padded, three-dimensional enclosure to completely envelope any items carried. Although the plastic CD-holding inserts would, after importation, provide an organizational aspect to the cases, we found that the articles, as entered, constituted fully functional containers capable of providing storage, protection, and portability. The CD cases, although incomplete, unfinished, and not named exemplars of heading 4202, were found to possess the essential characteristics common to the containers of heading 4202, and were therefore classified in subheading 4202.92.9025, HTSUSA.

We find that, unlike the cases of HQ 958773, the bottom half of the pullman suitcase subject to HQ 089289 and HQ 951183 does not form an enclosure that is able to organize, store, protect, or carry items. The incomplete article, as entered, does not possess the essential character of the complete or finished article.

With respect to whether corresponding component parts of a finished suitcase, e.g., the top half and bottom half imported in separate shipments, can be aggregated and classified as a complete article, we find that they cannot. Although it is declared in HQ 951183 that "[t]he fact that the components will be imported separately has no impact on the applicable classification of the bottom portion and the top portion," the statement is incorrect and runs contrary to law. In HQ 954820, issued December 13, 1993, this office noted:

> It is well settled that articles which are not imported together are precluded from being an entirety. *United States v. Baldt Anchor, Chain & Forge Division of Boston Metals Co.*, 59 CCPA 122, C.A.D. 1051, 429 F.2d 1403 (1972).
>
> The term "entirety," which was used in the Tariff Schedules of the United States (TSUS), is embodied in GRI 2(a) of the HTSUS * * *.

The pertinent issue in HQ 954820 was whether two separate shipments which consisted of: 1) the various parts of a printing press; and 2) the main printing head, comprised a complete and unassembled printing press. We held that the two shipments could not constitute a complete printing press and could not be treated as if they had been entered at the same time. The fact that the main printing head was intended to be included in the shipment of the various parts was also found to be irrelevant to the classification. For determinations concerning similar issues, see HQ 081999, issued December 10, 1990, and HQ 958807, issued April 30, 1996.

In light of the above analysis and precedent, we find that the bottom half of the pullman suitcase, as entered, does not possess the essential character of a complete or finished suitcase, and that the imported suitcase component cannot be considered in the aggregate with a separately imported component (e.g., a corresponding top half of a suitcase) so as to be classified as a complete article. The subject article is a part, and is classified in subheading 6307.90.9989, HTSUSA.

Holding:

The imported component, identified as the bottom half of a pullman suitcase, is classified in subheading 6307.90.9989, HTSUSA, the provision for "Other made up articles, including dress patterns: Other: Other: Other, Other: Other." The general column one duty rate is 7 percent ad valorem.

HQ 089289, issued December 9, 1991, and HQ 951183, issued June 16, 1992, are hereby revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:TE 959015 GGD
Category: Classification
Tariff No. 6307.90.9989

ROBERT L. FOLLICK, ESQUIRE
FOLLICK & BESSICH, P.C.
513 West Mount Pleasant Avenue, Suite 205
Livingston, NJ 07039

Re: Revocation of NY 818857; Suitcase Components; Not incomplete articles with essential character of complete or finished suitcases; GRI 2(a); Headings 4202 and 6307; *Totes, Incorporated v. United States*, 18 C.I.T. 919, 865 F. Supp. 867 (1994), aff'd 69 F.3d 495 (Fed. Cir. 1995).

DEAR MR. FOLLICK:

In New York Ruling Letter (NY) 818857, issued to you February 16, 1996, on behalf of Seil Company, Ltd., of Korea, luggage components described as "the left and right sides of a vertical suitcase," each imported in separate shipments, were classified in subheading 4202.12.8070, HTSUSA, textile category 670, the provision for "Trunks, suitcases$and similar containers * * *: Trunks, suitcases * * *: With outer surface of plastics or of textile materials: With outer surface of textile materials: Other, Other: Other: Of man-made fibers." You subsequently requested reconsideration of that ruling. We have reviewed NY 818857 and have found it to be in error. Therefore, this ruling revokes NY 818857.

Facts:

The samples at issue are the separately imported left and right sides of a vertical suitcase. The articles are described as having an outer surface composition of man-made textile materials. One of the sides is said to be complete with utility pockets.

Issues:

1) Whether the separately imported component part of a finished suitcase possesses the essential character of a complete or finished suitcase classifiable under heading 4202, HTSUSA.

2) Whether separately shipped, corresponding component parts of a finished suitcase (e.g., the left and right halves) can be aggregated so that each separately imported component is classifiable as a complete or finished article.

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the

headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Heading 4202, HTSUSA, covers "Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper."

As noted above, classification is made in accordance with the GRI and the terms of the headings with the guidance of the EN to understand the scope of the headings and GRI. Since the left or right half of a suitcase, standing alone, is not a named exemplar of heading 4202, nor similar to any of the complete, fully functional containers named therein, the article cannot be classified pursuant to GRI 1 alone, i.e., according to the terms of the heading. We therefore look to GRI 2(a), which states:

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

EN (I) and (VI), to GRI 2(a), are particularly helpful in understanding the scope of GRI 2(a) as it applies to the imported merchandise. The EN contain the following guidance:

> (I) The first part of Rule 2(a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished, **provided** that, as presented, it has the essential character of the complete or finished article.
>
> (VI) This Rule also applies to incomplete or unfinished articles presented unassembled or disassembled provided that they are to be treated as complete or finished articles by virtue of the first part of this Rule.

Since each of the imported components is one half of a suitcase, each is an incomplete article. Therefore, the first part of GRI 2(a) is the part of the rule that is most pertinent to the facts of this case. One half of a suitcase may be classified under heading 4202, HTSUSA, if it is found that the incomplete article, as presented, has the essential character of the complete or finished article.

In determining whether the left side or right side of a suitcase possesses the essential character of a complete or finished suitcase, we look to the judicial guidance provided in *Totes, Incorporated v. United States*, 18 C.I.T. 919, 865 F. Supp. 867 (1994), aff'd 69 F.3d 495 (Fed. Cir. 1995). In *Totes*, the Court of International Trade (CIT) held that the essential characteristics and purposes of the heading 4202 exemplars are to organize, store, protect and carry various items. Unlike suitcases and all of the other exemplars enumerated in heading 4202, HTSUSA, neither of the separately imported components under consideration here is able to organize, store, protect, or carry items.

In HQ 956538, issued November 29, 1994 (before the CIT's holding in the *Totes* case had been affirmed by the Court of Appeals for the Federal Circuit), this office discussed the first part of GRI 2(a), and found that the front panel assembly for a suitcase did not possess the essential character of the complete article. We construed the term "essential character" to mean "the attribute which strongly marks or serves to distinguish what an article is; that which is indispensable to the structure, core or condition of the article." We found that the front panel was no more important to the finished article than the absent walls and rear panel. The front panel assembly was classified in subheading 6307.90.9989, HTSUSA.

In HQ 958773, issued July 29, 1996, we considered the classification of incomplete or unfinished cases that would be fitted, after importation, to hold compact discs (CDs). The protestant had claimed that the merchandise should be classified in subheading 6307.90.9989, HTSUSA, because the cases were imported without the CD-holding, plastic inserts (that would be affixed after importation), and therefore did not have the essential character of finished CD cases. We noted that, despite the absence of the special inserts, the cases, as imported, were designed and dedicated to function as carrying cases that provided

a secure, foam-padded, three-dimensional enclosure to completely envelope any items carried. Although the plastic CD-holding inserts would, after importation, provide an organizational aspect to the cases, we found that the articles, as entered, constituted fully functional containers capable of providing storage, protection, and portability. The CD cases, although incomplete, unfinished, and not named exemplars of heading 4202, were found to possess the essential characteristics common to the containers of heading 4202, and were therefore classified in subheading 4202.92.9025, HTSUSA.

We find that, unlike the cases of HQ 958773, neither of the separately imported components of the vertical suitcase forms an enclosure that is able to organize, store, protect, or carry items. Neither of the incomplete articles, as entered, possesses the essential character of the complete or finished article.

With respect to whether corresponding component parts of a finished suitcase, in this case, the left and right sides imported in separate shipments, can be aggregated and classified as a complete article, we find that they cannot. In HQ 954820, issued December 13, 1993, this office noted:

> It is well settled that articles which are not imported together are precluded from being an entirety. *United States v. Baldt Anchor, Chain & Forge Division of Boston Metals Co.*, 59 CCPA 122, C.A.D. 1051, 429 F.2d 1403 (1972).
>
> The term "entirety," which was used in the Tariff Schedules of the United States (TSUS), is embodied in GRI 2(a) of the HTSUS * * *.

The pertinent issue in HQ 954820 was whether two separate shipments which consisted of: 1) the various parts of a printing press; and 2) the main printing head, comprised a complete and unassembled printing press. We held that the two shipments could not constitute a complete printing press and could not be treated as if they had been entered at the same time. The fact that the main printing head was intended to be included in the shipment of the various parts was also found to be irrelevant to the classification. For determinations concerning similar issues, see HQ 081999, issued December 10, 1990, and HQ 958807, issued April 30, 1996.

In light of the above analysis and precedent, we find that neither the left nor right sides of a vertical suitcase, as entered, possesses the essential character of a complete or finished suitcase, and that the separately imported suitcase components cannot be considered in the aggregate so as to be classified as a complete article. Each of the subject articles is a part, and each is classified in subheading 6307.90.9989, HTSUSA.

Holding:

Each of the imported components, identified as the left and right sides of a vertical suitcase, is classified in subheading 6307.90.9989, HTSUSA, the provision for "Other made up articles, including dress patterns: Other: Other: Other, Other: Other." The general column one duty rate is 7 percent ad valorem.

NY 818857, issued February 16, 1996 is hereby revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE "MONAMI WHITE CLEAN CORRECTION PEN"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter and treatment relating to the classification of "MonAmi White Clean Correction Pen."

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling concerning the tariff classification of the "MonAmi White Clean Correction Pen," under the Harmonized Tariff Schedule of the United States (HTSUS), and revoking any treatment previously accorded by Customs to substantially identical transactions.

DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 22, 2000.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch (202) 927–2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility.**" These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on January 26, 2000, in the CUSTOMS BULLETIN, Vol. 34, No. 4, pro-

posing to revoke New York Ruling Letter (NY) D84861, dated December 9, 1998, pertaining to the tariff classification of the "MonAmi White Clean Correction Pen." No comments were received in response to this notice.

As stated in the proposed notice, this revocation covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In NY D84861, Customs ruled that the "MonAmi White Clean Correction Pen" was classified in subheading 3206.49.1000, HTSUS, as a dispersion of pigments in plastics materials. After review and consideration of NY D84861, we are of the opinion that the "MonAmi White Clean Correction Pen" does not fall within subheading 3206.49.1000, HTSUS. Rather it is classifiable in subheading 3824.90.4500, HTSUS, the provision for mixtures that are in whole or in part of hydrocarbons derived in whole or in part from petroleum, shale oil or natural gas.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NY D84861, and any other rulings not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 962861 (*see* the Attachment to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

Dated: March 7, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, March 7, 2000.

CLA-2 RR:CR:GC 962861 MGM
Category: Classification
Tariff No. 3824.90.4500

MS. AMY JOHNSON
WAL MART STORES, INC.
702 Southwest 8th Street
Bentonville, AR 72716-8023

Re: MonAmi White Clean Correction Pen; NY D84861.

DEAR MS. JOHNSON:

In response to your letter dated November 16, 1998, the Director, Customs National Commodity Specialist Division, New York, issued you New York Ruling Letter (NY) D84861, dated December 9, 1998, concerning the tariff classification of the MonAmi White Clean Correction Pen, Vendor Stock 00331. That ruling classified the MonAmi White Clean Correction Pen in subheading 3206.49.1000, Harmonized Tariff Schedule of the United States (HTSUS), as a dispersion of pigments in plastics materials.

Upon review of NY D84861, Customs has concluded that the MonAmi White Clean Correction Pen is properly classified in subheading 3824.90.4500, HTSUS, the residual provision for products of the chemical or allied industries.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057, 2186), notice of the proposed revocation was published on January 26, 2000, in Volume 34, Number 4 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

Facts:

The MonAmi White Clean Correction Pen is a disposable plastic pen type cartridge applicator with a cap. It is typically used to cover written or typed mistakes in a document. The correction pen is used to administer correction fluid to paper. The correction fluid is a mixture of titanium dioxide, which acts as a white colorant, polyacrylic resin, which acts as a binder, and methylcyclohexane, which acts as a solvent.

Issue:

What is the correct classification of the MonAmi White Clean Correction Pen?

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See*, T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

In NY D84861, the MonAmi White Clean Correction Pen was classified in subheading 3206.49.1000, HTSUS, as a dispersion of pigments in plastics materials. However, Note 2(d), Chapter 38, HTSUS, states that "correcting fluids put up in packings for retail sale"

are included within heading 3824 and are not to be classified in any other heading of the tariff schedule. Further, the ENs to Chapter 38 state:

> This heading covers: * * * [c]orrecting fluids put up in packings for retail sale. These are opaque (white or otherwise coloured) fluids consisting essentially of pigments, binders, and solvents, used for masking errors or other unwanted marks in typescripts, manuscripts, photocopies, offset printing masters or the like. They are usually put up in small bottles (the cap of which is usually provided with a small brush), in tins or in the form of pens.

EN 38.24 (B)(21). As the subject merchandise is correcting fluid put up in a packing for retail sale, it is classified in heading 3824, HTSUS.

One component of the corrective fluid is methyl cyclohexane. Methyl cyclohexane is a hydrocarbon derived from petroleum. Hawley, *The Condensed Chemical Dictionary*, 10th edition. Subheading 3824.90.45, HTSUS, provides for "Mixtures that are in whole or in part of hydrocarbons derived in whole or in part from petroleum, shale oil or natural gas." As the corrective fluid is a mixture which contains hydrocarbons derived from petroleum, it falls in this provision.

Two previous New York rulings classified correction products. NY 893002, dated December 15, 1993, classified correction fluid in bottles and in pens in subheading 3823.90.4500, HTSUS (1993), the predecessor provision of subheading 3824.90.4500, HTSUS (2000). NY 845348, dated September 19, 1989, classified correction fluid in bottles and in pens in subheading 3823.90.5050, HTSUS (1989), as mixtures not containing hydrocarbons. The discrepancy between these two rulings appears to arise from differences in the components which make up the merchandise being classified, thus there is no conflict between them.

Holding:

The MonAmi White Clean Correction Pen is classified in subheading 3824.90.4500, HTSUS (Annotated). NY D84861 is revoked.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF PARTS FOR CLUTCHES USED IN AUTOMATIC TRANSMISSIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letter and treatment relating to tariff classification of parts for clutches used in automatic transmissions.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling relating to the tariff classification of parts for clutches used in automatic transmissions, and revoking any treatment Customs has previously accorded to substantially identical transactions. Notice of the proposed modification was published on January 19, 2000, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 22, 2000.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927–0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to Customs obligations, a notice was published on January 19, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 2/3, proposing to revoke *NY* 818430, dated February 21, 1996. This ruling classified a rear or forward clutch retainer drum, a front or high clutch drum, a low reverse servo piston, and a low reverse drum, parts for clutches used in automatic transmissions in motor vehicles, as other parts for power trains, in subheading 8708.99.67, Harmonized Tariff Schedule of the United States (HTSUS). One comment was received in response to this notice. The commenter raised the following contentions: (1) unlike vehicles with manual transmissions, which have clutches that are separate from the transmission, vehicles with automatic transmissions have clutches that are internal components of the transmission, specifically the torque converter. Consequently, such clutch components should be more specifically regarded as parts of torque converters than as parts for clutches; (2) the fact that the general public may characterize an article used with automatic transmissions as a "clutch" does not mean that article should be similarly regarded for tariff purposes; (3) under General Rule of Interpretation (GRI) 3(b), HTSUS, the essential character of a clutch for an automatic transmission is as part of the vehicle's power train.

As to the first contention, Customs recognizes that not all goods are necessarily classifiable according to their literal meaning. In this case, however, notwithstanding the fact that clutches for automatic transmissions are internal to the transmission, they nevertheless disengage the engine automatically as the gears change, which is a function that clutches perform. Customs interprets the second contention as an affirmation that tariff terms are to be interpreted according to their common and commercial meanings which are presumed to be the same. The fact that the general public may regard an article as a clutch is an indication it is within the common and commercial meaning of the term for tariff purposes. As to the third contention, Customs disagrees that GRI 3(b) governs the classification of the goods at issue. This is because under GRI 3(a), applied at the subheading level through GRI 6, the subheading for clutches and parts thereof, other, provides the most specific description.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking *NY* 818430 to reflect the proper classification of the rear or forward clutch retainer drum, the front or high clutch drum, the low reverse servo piston, and the low reverse drum in subheading 8708.93.75, HTSUS, as other clutches and parts thereof, pursuant to the analysis in *HQ* 963322 which is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: March 3, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 3, 2000.

CLA-2 RR:CR:GC 963322 JAS
Category: Classification
Tariff No. 8708.93.75

MR. DON DIXON
L & D HOLDINGS
1480 Richmond Street
Kelowna B.C. V1Y3T4
Canada

Re: *NY* 818430 Revoked; Parts of Clutches for Automatic Transmissions.

DEAR MR. DIXON:

In response to your letter of January 22, 1996, the Director of Customs National Commodity Specialist Division, New York, issued *NY* 818430 on February 21, 1996. This ruling concerned the classification under the Harmonized Tariff Schedule of the United States (HTSUS), of parts of clutches for automatic transmissions in motor vehicles.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of *NY* 818430 was published on January 19, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 2/3. One comment was received in response to that notice.

Facts:

Articles the subject of *NY* 818430 were described as a rear or forward clutch retainer drum, #22766, a front or high clutch drum, #22767, a low reverse servo piston, #22057 and a low reverse drum, #22157. They were said to be parts used in automatic transmissions for motor vehicles. The parts were not otherwise described.

The provisions under consideration are as follows:

8708	Parts and accessories of the motor vehicles of headings 8701 to 8705:
	Other parts and accessories:
8708.93	Clutches and parts thereof:
	For other vehicles:
8708.93.60	Clutches
8708.93.75	Other
8708.99	Other:
8708.99.67	Other parts for power trains

Issue:

Whether parts for automatic transmissions in motor vehicles are parts of power trains or parts of clutches.

Law and Analysis:

General Rule of Interpretation, HTSUS, (GRI) 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 3(a) states in part that when goods are, *prima* facie, classifiable under two or more headings the heading which provides the most specific description shall be preferred to headings providing a more general description. GRI 6 states, in part, that goods are classifiable in the subheadings of a heading according to the terms of those subheadings and any related subheading notes and, by appropriate substitution of terms, to GRIs 1 through 5, on the understanding that only subheadings at the same level are comparable.

A clutch is a mechanism that engages and disengages the engine's flywheel from the drive shaft as gears shift through the transmission. When used with a manual transmission, a clutch assembly is a separate unit located between the rear of the engine block and the transmission. Automatic transmissions, however, utilize a type of fluid coupling called a torque converter to couple the engine and the gearbox incorporated in the transmission. The gearbox contains a set of planetary gears, with clutches and brake pads for engaging the desired gears. Clutch assemblies for manual transmissions are separate units located between the rear of the engine block and the transmission. However, because automatic transmissions have internal clutches that disengage the engine automatically as the gears change, *NY* 818430 regarded such clutch assemblies, the transmission, together with other associated parts for transmitting power from the engine through the drive shaft to the wheels as parts of the vehicle's power train.

However, tariff terms are generally construed in accordance with their common and commercial meanings which are presumed to be the same. Articles that disengage the engine automatically as the gears change perform the function of a clutch and are within the common and commercial meaning of that term. In addition, for purposes of subheading 8708.93 the provision for clutches describes a commodity eo *nomine*, by name. Normally, an *eo nomine* designation, without limitation, or a shown contrary legislative intent or judicial decision will include all forms of the named article. Therefore, when comparing subheadings within heading 8708, GRI 3(a), HTSUS, applied at the subheading level through GRI 6, authorizes classification in the subheading providing the most specific description. Thus, in classifying the articles designated #22766, #22767, #22057, and #22157, all parts of clutch assemblies for automatic transmissions, the subheading description for clutches and parts thereof, other, is more specific than other parts for power trains.

Holding:

Under the authority of GRI 3(a), applied at the subheading level through GRI 6, the rear or forward clutch retainer drum #22766, the front or high clutch drum #22767, the low reverse servo piston #22057, and the low reverse drum #22157 are provided for in heading 8708. They are classifiable in subheading 8708.93.75, HTSUS.

Effect on Other Rulings:

NY 818430, dated February 21, 1996, is revoked. revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF THERMAL ENERGY STORAGE NODULES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letter and treatment relating to tariff classification of thermal energy storage nodules.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling relating to the tariff classification of thermal energy storage nodules, and revoking any treatment Customs has previously accorded to substantially identical transactions. Notice of the proposed modification was published on January 26, 2000, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 22, 2000.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927–0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to Customs obligations, a notice was published on January 26, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 4, proposing to

revoke *NY* C86245, dated May 6, 1998. This ruling classified the thermal energy storage nodules as other articles of plastics, in subheading 3926.90.98, Harmonized Tariff Schedule of the United States (HTSUS). No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking *NY* C86245 to reflect the proper classification of the thermal energy storage nodules in subheading 8419.90.80, HTSUS, as other parts of machinery for the treatment of materials by a process involving a change of temperature such as cooling, pursuant to the analysis in *HQ* 962980 which is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: March 3, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 3, 2000.

CLA–2 RR:CR:GC 962980 JAS
Category: Classification
Tariff No. 8419.90.80

MOUDOOD A. ASLAM
CRISTOPIA ENERGY SYSTEMS
165 Via Catarina
San Dimas, CA 91773

Re: *NY* C86245 Revoked; Thermal Energy Storage Nodules.

DEAR MR. ASLAM:

In *NY* C86245 which the Director of Customs National Commodity Specialist Division, New York, issued to you on May 6, 1998, thermal energy storage nodules for use with a latent heat thermal energy storage tank were held to be classifiable in subheading 3926.90.98, Harmonized Tariff Schedule of the United States (HTSUS), as other articles of plastics. In response to a letter from the Carrier Corporation, dated July 1, 1999, we have reconsidered this classification and determined that it is incorrect.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of *NY* C86245 was published on January 26, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 4. No comments were received in response to that notice.

Facts:

Thermal energy storage nodules are hollow spherical shapes of polyethylene filled with a eutectic salt solution phase change material (PCM). Together with an insulated thermal energy storage tank these nodules comprise a thermal energy storage system (TESS). Submitted literature indicates these nodules are available in 77-mm diameters for industrial refrigeration applications and in 96-mm diameters for commercial air conditioning systems utilizing water chillers as the refrigerating unit. The latter is said to be their principal use. The nodules permit thermal energy to be stored at temperatures between –33° C and +27° C. In operation, the nodules are placed in the storage tank which is connected by piping to one or more liquid chillers. The chillers produce a cold, glycol-based transfer fluid that circulates around the nodules at a temperature below the freezing temperature of the PCM which causes it to crystallize. This allows the nodules to absorb cold from the transfer fluid. When energy demand increases, the glycol-based transfer fluid is again circulated at temperatures higher than the PCM fusion temperature, thus allowing a controlled energy release which chills the liquid. This chilled liquid circulates through coils where fans blow the cooled air either through individual room units or through the central air conditioning system.

In reviewing *NY* C86245 we have been asked to consider a provision in heading 8418, HTSUS, as parts of refrigerating or freezing equipment or, alternatively, an equivalent provision in heading 8415, HTSUS, as parts of air conditioning machines.

The HTSUS provisions under consideration are as follows:

8415	Air conditioning machines, comprising a motor-driven fan and elements for changing the temperature and humidity * * *; parts thereof:
8415.90	Parts:
8415.90.80	Other
* * * * * * *	
8418	Refrigerators, freezers and other refrigerating or freezing equipment, electric or other * * *; parts thereof:
8418.99	Parts:
8418.99.80	Other
* * * * * * *	
8419	Machinery, plant or laboratory equipment, whether or not electrically heated, for the treatment of materials by a process involving a change of temperature, such as * * * cooling; parts thereof:

8419.90	Parts:
8419.90.80	Other

Issue:

Whether the thermal energy storage nodules are parts of machines or apparatus of heading 8415, 8418, or of heading 8419.

Law and Analysis:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. Though not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System. Customs believes the ENs should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Air conditioning machines of heading 8415 that utilize water chillers as the refrigerating unit are classifiable in subheading 8415.82.00, HTSUS, and parts thereof in subheading 8415.90.80, HTSUS. A TESS, consisting of an insulated tank and thermal energy storage nodules, is capable of substituting for a water chiller and, when imported with an air conditioning machine, would be classifiable in subheading 8415.82.00, HTSUS. But, as to the classification of the nodules themselves, it is necessary to determine the classification of the TESS, of which they are more immediately parts. If imported separately, water chillers are classifiable in subheading 8418.69.00, HTSUS, as other refrigerating or freezing equipment. But, notwithstanding the TESS may substitute for a chiller, they are not similarly classifiable. Absorption liquid chiller/heaters principally used to produce chilled water for space cooling in commercial buildings, but also used to produce hot water for heating, are classifiable in subheading 8418.69.00, HTSUS. *See HQ* 962279, dated December 23, 1998, and *HQ* 961196, dated January 8, 1999. These are machines generally consisting of a burner, condenser, evaporator, cooling tower, absorption unit, circulation pump, and heat exchanger. A TESS, on the other hand, requires cooled water from a chiller to charge the eutectic salt solution phase change material in the nodules. As imported, the TESS is not a machine and is incapable of producing anything. The available evidence does not support classification of the TESS in heading 8418.

The ENs on p. 1271 state that heading 8419 covers machinery and plant designed to submit materials (solid, liquid or gaseous) to a heating or cooling process in order to cause a simple change of temperature, or to cause a transformation of the materials resulting principally from the temperature change. In this case, the thermal energy nodules in the TESS change temperature, i.e., become colder, by absorbing cold from water supplied by a liquid chiller. The TESS, therefore, conforms to the 8419 EN description, and the nodules qualify as parts.

Holding:

Under the authority of GRI 1, the Thermal Energy Storage System (TESS) is provided for in heading 8419.89.90, HTSUS. The thermal energy storage nodules, being integral parts of the TESS, are classifiable in subheading 8419.90.80, HTSUS.

Effect on Other Rulings:

NY C86245, dated May 6, 1998, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director.
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway
Richard K. Eaton

Senior Judges

James L. Watson

Herbert N. Maletz

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 99–137)

AIMCOR AND SKW METALS & ALLOYS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND COMPANHIA DE FERRO LIGAS DA BAHIA, DEFENDANT-INTERVENOR

Consolidated Court No. 96–12–02868

[Plaintiffs' Motion For Judgment Upon The Agency Record granted in part and denied in part.]

(Decided December 17, 1999)

Baker & Botts, L.L.P (William D. Kramer and *Martin Schaefermeier)*, for Plaintiffs.
David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director; U.S. Department of Justice, Civil Division, Commercial Litigation Branch, *(Kenneth S. Kessler); Peter Kirchgraber*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant.

OPINION

I

INTRODUCTION

WALLACH, *Judge:* This case comes before the Court on Plaintiffs' Motion For Judgment Upon The Agency Record ("Plaintiffs' Motion"). Plaintiffs challenge the decision of the International Trade Administration of the U.S. Department of Commerce ("Commerce" or "the Department") not to apply its methodology for hyperinflationary economies or otherwise adjust the direct cost-of-materials reported by Defendant-Intervenor, Companhia de Ferro Ligas da Bahia ("Ferbasa"), to account for hyperinflation. For the reasons below, the Court finds Commerce's decision not to be supported by substantial record evidence, since (a) Commerce failed to explain why, in contrast to previous examinations, it would not examine whether hyperinflation distorted costs incurred before the relevant reporting period; (b) Commerce appears to have erred in its assumptions concerning hyperinflation in Brazil and Ferbasa's inventory turnover period; and (c) Commerce failed to ad-

dress certain record evidence which indicates that Ferbasa's costs were distorted by hyperinflation. Accordingly, a further remand is necessary to allow Commerce to remedy its apparent errors or, where appropriate, provide further explanations.

II

BACKGROUND

Underlying Plaintiffs' Motion is Commerce's administrative review in *Ferrosilicon From Brazil; Final Results of Antidumping Duty Administrative Review ("Final Results")*, 61 Fed. Reg. 59,407 (1996), which covered exports of ferrosilicon by Ferbasa for the period August 16, 1993, through February 28, 1995. In this review, AIMCOR and SKW Metals & Alloys, Inc. requested that Commerce use its hyperinflationary methodology in measuring the cost-of-production of Ferbasa's home-market sales. Application of this methodology would have entailed using the replacement cost of Ferbasa's raw materials in inventory, as opposed to the historic or "normal inventory value" of such materials, in valuing Ferbasa's cost-of-production. *Final Results*, 61 Fed. Reg. at 59,408. According to Plaintiffs, such action was necessary to keep Ferbasa's reported cost-of-materials from being distorted by hyperinflation, since the materials in Ferbasa's inventory were valued at the time of purchase, but not used in production until a later time. *Id.* at 59,407.

In the *Final Results*, Commerce rejected Plaintiffs' suggestion, finding that, although Brazil experienced hyperinflation during the review period as a whole, it did not experience hyperinflation during the six months of the period of review (September 1, 1994, through February 28, 1995) in which the home-market sales at issue took place. *Id.* at 59,408. Further, Commerce found Plaintiffs' argument that Ferbasa's material costs were distorted by inventory bought during a period of hyperinflation to be "speculative and not supported by facts on the record." *Id.* Commerce noted that because the home market sales in question occurred fully two months after the period of hyperinflation ended (in June 1994), and because Ferbasa had an inventory turnover rate of approximately one month, it could reasonably conclude that Ferbasa's "costs were not distorted by inflation." *Id.*

Despite this initial rejection of Plaintiffs' requested adjustments, on June 18, 1998, Commerce asked that the Court remand this action so that it could reconsider using its hyperinflationary methodology. *See* Defendant's Motion For A Remand of June 18, 1998. Commerce requested this remand because, upon review of the record, it found that Brazil's economy had experienced hyperinflation through at least the beginning of August 1994, and not, as it initially found in the *Final Results*, through June 1994. *Id.* at 5. Separately, Commerce also requested a remand so that it could correct and review its treatment of certain kinds of interest income. *Id.* at 6. By Order dated June 24, 1998, the Court granted Defendant's Motion and remanded this case for further consideration of these issues.

On December 7, 1998, Commerce issued its *Final Results Of Redetermination Pursuant To Court Remand* ("*Redetermination*"). In the *Redetermination*, Commerce again found that, although the Brazilian economy (on average) experienced hyperinflation over the period of review, application of its hyperinflationary methodology was inappropriate for valuing Ferbasa's cost-of-production. Specifically, Commerce stated as follows:

> During the administrative proceeding, Ferbasa notified the Department at an early stage of this review that it made only one U.S. sale of ferrosilicon during the POR [period of review] (*i.e.*, that sale took place in December 1994). Given this single sale, Ferbasa requested the Department's permission to report cost and sales information for only those home market sales of subject merchandise that were made contemporaneously with the reported U.S. sale. Because under our matching methodology we would analyze only home market sales made during the window of contemporaneity [sales within 90 days before and 60 days after the month of the U.S. sale], we allowed Ferbasa to report only six months worth of cost and home market sales data.
>
> We agree with AIMCOR that the annual inflation rate in Brazil during the entire 18-month POR was hyperinflationary. However, for purposes of our analysis, we must consider the particular circumstances of this case, namely, that we decided to allow Ferbasa to report home market sales and cost data for a limited six-month period covering September 1994 through February 1995. Thus, our analysis must focus on this limited period, as opposed to the entire POR. The record evidence in this case demonstrates, and AIMCOR does not dispute this fact, that the inflation rate for the six-month period for which Ferbasa reported its costs is only 9.9 percent, or 21 percent per annum. We thus determine that the six-month reporting period in this case is not hyperinflationary.

Redetermination at 4–5 (citations and footnotes omitted). Because Commerce found that the six-month reporting period was not hyperinflationary (and, accordingly, that application of its hyperinflationary methodology was not necessary), it continued to rely upon Ferbasa's historical cost data in calculating its cost-of-production. *Id.* at 19.

In the *Redetermination*, Commerce also rejected Plaintiffs' argument that, notwithstanding the lack of hyperinflation during the six-month reporting period, Ferbasa's reported costs should be adjusted to account for hyperinflation prior to the reporting period. First, Commerce noted that its practice is to look to the relevant reporting period to determine whether an economy is hyperinflationary, and not to shift the reporting period to adjust for inflation in a prior period. *Id.* at 19. Even if Commerce had accepted Plaintiffs' argument that it should take into account Ferbasa's 37-day inventory turnover period, however, Commerce noted that "the rate of inflation during this period would not exceed 50 percent, and therefore, would not be considered hyperinflationary." *Id.* at 20. In this regard, Commerce also observed that "[a]lthough the actual inventory turnover period is 37 days, the month of August covers 31 of

the 37 days. It is therefore reasonable to state that the September costs are based on August prices." *Id.* at 20 n.5.

Second, Commerce disagreed with the conclusions Plaintiffs drew from the evidence at hand. Examining Plaintiffs' argument that Ferbasa's input purchase prices for the six-month reporting period greatly exceeded the cost of its material inputs consumed during this period, Commerce stated:

> We do not agree with AIMCOR's implied conclusion since it is already clear from the record that inflation in Brazil during the six-month reporting period was not hyperinflationary. Moreover, the values cited by AIMCOR appear to reflect total consumption value and total purchases value without regard to quantities. Therefore, these figures are irrelevant to any analysis of distortion of cost data resorting from inflation.

Id. at 20 (citation omitted).

In addition to its findings concerning hyperinflation, and in accordance with the Court's Order of June 24, 1998, in the *Redetermination* Commerce deducted from Ferbasa's claimed offset to financial expenses both the interest income it collected for late payments on outstanding accounts receivables and the income Ferbasa derived from currency fluctuations that positively affected its accounts receivables. *Id.* at 9–11, 15.[1] Also per the Court's instruction, Commerce reexamined the other categories of interest income reported by Ferbasa and found that, in all instances, Ferbasa failed to adequately demonstrate that the income at issue was short-term interest income that should be used to offset its financial expenses in the calculation of cost-of-production and constructed value. *Id.* at 11–15, 24–32. In so finding, Commerce reversed the position it had taken in the *Final Results*. *See id.* at 8 (citing *Final Results*, 61 Fed. Reg. at 59,412–13).

Because Plaintiffs claim that Commerce has now "correctly made no offset to Ferbasa's financial expenses," and no longer challenges this aspect of the *Final Results*, the Court does not address this issue in the analysis below. *See* Supplemental Brief In Support Of Plaintiffs' Motion For Judgment Upon The Agency Record ("Supplemental Brief") at 16.

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[1] As Commerce explained on page 7 of the *Redetermination*:

> In calculating cost-of-production (COP) and constructed value (CV), it is the Department's practice to allow a respondent to offset (*i.e.*, reduce) financial expenses with interest income earned from the general operations of the company. *See, e.g., Timken v. United States*, 852 F. Supp. 1040, 1048 (CIT 1994). In calculating a company's cost of financing, we recognize that, in order to maintain its operations and business activities, a company must maintain a working capital reserve to meet its daily cash requirements (*e.g.*, payroll, suppliers, etc.). The Department further recognizes that companies normally maintain this working capital reserve in interest-bearing accounts. The Department, therefore, allows a company to offset its financial expense with the short-term interest income earned on these working capital accounts. The Department does not, however, allow a company to offset its financial expense with income earned from *investing* activities (*e.g.*, long-term interest income, capital gains, dividend income) because such activities are not related to the current operations of the company.

III

DISCUSSION

A

STANDARD OF REVIEW

In reviewing Plaintiffs' challenge, the Court "shall hold unlawful any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994). Substantial evidence is something more than a "mere scintilla," and must be enough evidence to reasonably support a conclusion. *Primary Steel, Inc. v. United States*, 17 CIT 1080, 1085, 834 F. Supp. 1374, 1380 (1993); *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A.*, 10 CIT at 404–5, 636 F. Supp. at 966.

Further, should the Court be called upon to review Commerce's construction of a statute which it administers, the Court's initial inquiry will be to determine "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 843–44. Consequently, "[t]he court will defer to the agency's construction of the statute as a permissible construction if it 'reflects a plausible construction of the plain language of the statute[s] and does not otherwise conflict with Congress' express intent.'" *Torrington Co. v. United States*, 82 F.3d 1039, 1044 (Fed. Cir. 1996) (citing *Rust v. Sullivan*, 500 U.S. 173, 184 (1991)).

It is under these standards that the Court considers Plaintiffs' claims.

B

COMMERCE'S DECISION NOT TO EXAMINE THE ENTIRE PERIOD OF REVIEW IN DECIDING WHETHER TO EMPLOY ITS HYPERINFLATIONARY METHODOLOGY IS SUPPORTED BY SUBSTANTIAL RECORD EVIDENCE.

Plaintiffs first challenge the *Redetermination* on the grounds that Commerce did not adequately explain why it departed from its "long-established practice" of examining the entire period of review (*i.e.*, August 16, 1993 through February 28, 1995) in deciding whether to employ its hyperinflationary methodology. Supplemental Brief at 7. According to Plaintiffs, Commerce's current practice is to recognize an economy as hyperinflationary if its annual inflation rate during the period of review exceeds 50 %. *Id.* at 7–8. Given this standard, Plaintiffs argue, Com-

merce should have recognized Brazil as hyperinflationary, since Brazil's 2,618 % annual inflation rate during the eighteen-month period of review greatly exceeds this 50 % threshold. *Id.* at 8.

At its heart, Plaintiffs' argument is centered on the premise that Commerce's "long-standing practice" is to use a replacement-cost methodology when an economy experiences hyperinflation over the *entire* period of review. *Id.* at 7. A review of the parties' submissions and the antidumping investigations cited therein, however, indicates that Plaintiffs' underlying premise is incorrect. For example, as an illustration of Commerce's "practice," Plaintiffs cite, *inter alia*, Commerce's statement in *Carbon Steel Pipe From Turkey* that "we routinely examine the entire review period to determine whether high inflation exists." *Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey* ("*Carbon Steel Pipe From Turkey*"), 62 Fed. Reg. 51,629, 51,630 (1997). A review of that investigation, however, shows that the quoted statement is qualified by the clause "although not dispositive of the issue." *Id.* ("[A]lthough not dispositive of the issue, we routinely examine * * *."). Read as a whole, this statement indicates that, while it may be Commerce's practice to *look at* inflation during the entire period of review in deciding whether it should use a hyperinflation methodology, Commerce has not always viewed this factor as being determinative, as Plaintiffs seem to contend.

Similarly undermining Plaintiffs' premise is Defendant's argument that, rather than routinely focusing on the entire review period, Commerce's practice actually focuses on the period in which a respondent reports its cost and price information. *See* Defendant's Response To Plaintiffs' Supplemental Brief In Support Of Plaintiffs' Motion For Judgment Upon The Agency Record ("Defendant's Response") at 11. According to Defendant, "[i]n some cases, the period of reporting this [price and cost] information coincides with the POR. Other times, Commerce may limit its reporting period to a 90/60 day window of contemporaneity." *Id.* at 11–12 (citations omitted). To illustrate this methodology, Defendant cites the approach Commerce took in *Silicomanganese from Brazil; Final Results of Antidumping Duty Administrative Review* ("*Silicomanganese from Brazil; Final Results*"), 62 Fed. Reg. 37,869, 37,876 (1997). Although the period of review in this investigation covered fifteen months, the respondent was allowed to submit home-market sales and cost-of-production data for only the six months surrounding its sole U.S. sale. *See Silicomanganese From Brazil: Preliminary Results of Antidumping Administrative Review*, 62 Fed. Reg. 1,320, 1,322–23 (1997). As in the case at bar, because Commerce only examined cost and price data from a six-month period, it looked only to this same six-month period, and not the entire period of review, in deciding whether the use of a replacement cost (*i.e.*, hyperinflationary) methodology was necessary. *Silicomanganese from Brazil; Final Results*, 62 Fed. Reg. at 37,876.

Based on the foregoing, as well as other authority,[2] the Court doubts whether the "long-standing practice" identified by Plaintiffs is as uniform as Plaintiffs suggest. While it is clear that Commerce has repeatedly looked at inflation over an entire period of review as an important guide in deciding whether it should use a respondent's replacement costs, it is not clear that is Commerce's exclusive "practice." Instead, it appears Commerce treats each investigation on a case-by-case basis, and decides whether to employ its hyperinflation methodology based on the facts before it, rather than any standard time measurement.

Regardless of how one chooses to characterize Commerce's "practice," however, the Court finds that the explanation Commerce set out in the *Redetermination* provides substantial record evidence in support of its actions. Assuming, as Plaintiffs allege, that Commerce's standard "practice" is to use a respondent's replacement costs whenever the period of review, when viewed as a whole, is hyperinflationary, Commerce may still depart from this practice so long as (a) it articulates its reason for doing so, and (b) its explanation is supported by substantial record evidence and is otherwise in accordance with law. *Queen's Flowers De Colombia v. United States*, 981 F. Supp. 617, 626 (CIT 1997).[3] As explained by the Supreme Court:

> [T]he agency, to engage in informal rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt its rules and policies to the demands of changing circumstances.

Rust v. Sullivan, 500 U.S. at 186 (citations and internal quotations omitted). *See also Hussey Copper, Ltd. v. United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993) ("This rule [against creating conflicting precedents] is not designed to restrict an agency's consideration of the facts from one case to the next, but rather it is to insure consistency in an agency's administration of the statute.") (internal quotations omitted).

In this case, Commerce adequately explained why it did not look to inflation over the entire period of review in deciding whether to apply its

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[2] The citations provided by the parties were inconclusive concerning Commerce's "practice." One other investigation seemingly supports Plaintiffs' position (in that Commerce treated the whole POR as hyperinflationary, even though part of it clearly was not), but there Commerce specifically noted that "[t]he hyperinflationary methodology employed by the Department in these preliminary results of review is based on the facts particular to this review." *Preliminary Results of Antidumping Administrative Review: Gray Portland Cement and Clinker From Mexico*, 61 Fed. Reg. 51,676, 51,681 (1996). In no investigation reviewed by the Court did Commerce expressly discuss any "practice" or "methodology" of looking to a particular period of time (such as the period of review or even, as Defendant claims, the period for which prices and costs are reported) in determining whether replacement costs should be used.

The Court also notes that nothing in Commerce's Antidumping Manual indicates that Commerce routinely looks to a particular time period in assessing whether hyperinflationary adjustments are necessary. *See* ITA Antidumping Manual, Chapter 8, pp. 77–81 (discussing high inflation economies). That Manual expressly states that, in calculating cost-of-production and constructed value in high inflation economies, "the decision to use indexation and the selection of an appropriate index/exchange rate system should be made on a case-by-case basis." *Id.* at 81.

[3] As explained by the Court in *Queen's Flowers de Colombia*:

> The court's review of an agency's change of position or practice will typically center on whether the action was arbitrary. A change is arbitrary if the factual findings underlying the reason for change are not supported by substantial evidence. Apart from factual findings, agency arbitrariness may also manifest itself in the particular reasoning offered by the agency; principally, if the reasoning is inconsistent with the statutory mandate, or, to a lesser extent, if the reasoning (or lack thereof) violates general principles of administrative law, or offends standrds of procedural fairness implied in the statute. In this context the court reviews an agency change of position or practice to insure it is "in accordance with law."

981 F. Supp. at 626 n.7 (citations omitted).

hyperinflationary methodology. As Commerce stated in the *Redetermination*, this case presented a unique situation, since Ferbasa made only one U.S. sale of ferrosilicon during the eighteen-month period of review. *See Redetermination* at 4. Given this fact, Commerce decided that it did not need to examine price and cost data from across the entire period of review. *Id.* at 5. Rather, and in line with its long-standing practice of using a six-month window for comparing home market and export sales,[4] Commerce limited its period of review of home-market sales to the six-month period between September 1994 and February 1995. *Id.*

Because Commerce only needed to examine price and cost data from a six-month section of the entire period of review, Commerce decided that it did not need to look at the entire eighteen months in deciding whether to use a hyperinflationary methodology. Rather, to determine whether an adjustment to Ferbasa's reported costs was appropriate, Commerce examined the inflation rate both during, and slightly before, the six-month reporting period. *Id.* at 5, 18–20.[5] It then reviewed the (historic) prices Ferbasa reported for its material inputs over the six-month period, *id.* at 6 ("[T]here is no pattern of direct material price increases during the six-month period."), and it considered Plaintiffs' argument that increasing replacement costs during the six-month reporting period were evidence of price distortions, *id.* at 20 ("[T]he values cited by AIMCOR appear to reflect total consumption value and total purchases value without regard to quantities. Therefore, these figures are irrelevant to any analysis of distortion of cost data resulting from inflation.").[6] In so doing, Commerce concluded that hyperinflation had not distorted the costs reported by Ferbasa for the six-month reporting period, and that these figures could properly be used for the Department's cost-of-production determination. *See id.* at 7, 18–19.

In light of this explanation, the Court finds that substantial record evidence supports Commerce's alleged departure from its "practice" of using a respondent's replacement costs whenever the period of review, when viewed as a whole, is hyperinflationary. As Commerce noted in the

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[4] *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 2,081, 2,111 (1997) ("We have a longstanding practice of considering sales within 90 days before and 60 days after the month of the U.S. sale to be acceptable as potential comparators."); *Certain Circular Welded Carbon Steel Pipes and Tubes From Thailand; Final Results of Antidumping Duty Administrative Review*, 61 1,328, 1,332 (1996) ("The Department has implemented the contemporaneous 90/60 window in order to fulfill the statutory requirements in section 773(a)(1) of the Tariff Act that [fair market value] be based on the price of contemporaneous sales of such or similar merchandise.").

[5] Although Commerce stated that "we do not shift the reporting period to account for inflation in a period prior to the reporting period," *Redetermination* at 19, it nevertheless proceeded to examine what the annualized inflation rate would be if it were to include the 37-day inventory period in its calculations. *See id.* at 20.

[6] In the draft results of the *Redetermination*, Commerce additionally noted that, as Ferbasa had reported replacement costs ("current material prices"), and not historical costs, for its material inputs, Plaintiffs' argument that direct material costs were distorted due to purchases during a hyperinflationary period was "moot." *Redetermination* at 6. For the final results, however, Commerce reversed its position on this issue, "agree[ing] with AIMCOR that there is contradictory evidence on the record and the preponderance of the record evidence suggests the conclusion that Ferbasa reported its cost-of-materials based on the weighted-average cost of inventory (*i.e.*, historical costs)." *Id.* at 18. In all other respects, however, Commerce appears to have adopted the reasoning set out in its draft results. *See, e.g., id.* at 15 ("Our results have not changed from the draft results of redetermination."), 18 ("[W]e continue to find that the application of our hyperinflationary economy methodology for the calculation of [cost-of-production] and [constructed value] in this case is not warranted."). Accordingly, the Court reviews the reasons stated in both the draft and final results sections of the *Redetermination* in deciding whether Commerce's actions are supported by substantial record evidence.

Redetermination, the purpose of substituting replacement costs for the historic costs reported by a respondent is to avoid "distortions in dumping margin calculations [that] can occur when costs incurred in one period are compared to sales prices from a later period when nominal currency values have fallen significantly." *Id.* at 3. In this case, Commerce essentially did no more than examine those factors which would most likely indicate whether the historic material costs reported by Ferbasa were understated due to hyperinflation and, finding that these costs likely were not so distorted, proceeded to use these figures. Given the fact that Commerce only had to compare home-market prices and costs over a six-month period, such an approach appears well-reasoned and more appropriate than looking at inflation over the entire period of review in deciding whether Ferbasa's reported costs were understated.

The Court also notes that Plaintiffs have failed to indicate how hyperinflation from an earlier part of the review period (e.g., late 1993) would have distorted the costs Ferbasa reported for the last six months of this period. In both the *Final Results* and the *Redetermination*, Commerce attached importance to the fact that Ferbasa's inventory turnover period was only 37 days. *See id.* at 20 n.5 (noting that [i]t is therefore reasonable to state that the September costs are based on August prices.); *Final Results*, 61 Fed. Reg. at 59,408 ("[B]ased upon the company's inventory turnover rate of approximately one month, Ferbasa produced ferrosilicon for these sales at most approximately one month earlier (*i.e.*, at a time when the Brazilian economy was not hyperinflationary").). Although, as will be discussed below, Commerce appears to have erred in its assumption that Ferbasa's inventory of material inputs, as opposed to its inventory of finished products, was actually turned over every 37 days, this record evidence nevertheless indicates that it was reasonable for Commerce to conclude that Ferbasa used its material inputs within a few months of purchase; a fact which strongly suggests that hyperinflation in late 1993 or early 1994 would have had no effect on the material costs Ferbasa reported for the period September 1994 through February 1995.

Finally, Plaintiffs argue that Commerce's decision in this case will create a "conflicting precedent" with *Carbon Steel Pipe From Turkey*, an investigation in which Commerce expressly rejected a respondent's claim that it should break the period of review into discrete periods in deciding whether to apply its hyperinflationary methodology. *Id.* at 8–9.

Carbon Steel Pipe From Turkey involved an administrative review in which the respondent reported price and cost data for sales over the entire, twelve-month period of review; a situation significantly different from the facts at bar, where Ferbasa reported prices and costs for only a six-month, non-inflationary, section of the period of review. More importantly, in *Carbon Steel Pipe From Turkey* Commerce found that, even if it were to split the period of review into the two segments requested by the respondent, inflation during both periods would exceed the Department's 50 % hyperinflationary threshold. *See Carbon Steel Pipe From*

Turkey, 62 Fed. Reg. at 51,630 ("[E]ven if we were to split the POR into 1993 and 1994 segments as requested by Borusan, we would find high inflation to exist for the entire period, since the inflation rate was greater than 50 percent during both 1993 and 1994."). Thus, Commerce's decision in *Carbon Steel Pipe From Turkey* not to break the period of review into discrete segments was not based on an institutional practice against doing so, but was based on the particular facts of that investigation. Since those facts are significantly different from the facts in this case (in which there *was* a significant, non-hyperinflationary period), Commerce's actions in *Carbon Steel Pipe From Turkey* do not conflict with its actions here.[7]

In short, the Court finds that, even if it were to agree with Plaintiffs' characterization of Commerce's "long-standing practice" (which it does not), substantial record evidence supports Commerce's decision not to follow this "practice" in the *Redetermination*. Contrary to Plaintiffs' claims, in the *Redetermination* Commerce made clear that, in determining whether to make adjustments to Ferbasa's reported costs, the question of whether there was hyperinflation over the entire period of review was largely irrelevant to the facts at hand. Rather, because this review involved prices and costs reported for only a six-month period of time, Commerce reasonably found that a narrower examination of the effects of hyperinflation was more appropriate. Accordingly, because the Court agrees that this was a reasonable and adequate explanation for Commerce's decision, and as Commerce's action in this instance was otherwise in accordance with law,[8] the Court rejects this aspect of Plaintiffs' challenge.

C

COMMERCE'S DECISION NOT TO ADJUST FERBASA'S COSTS TO ACCOUNT FOR HYPERINFLATION IS NOT SUPPORTED BY SUBSTANTIAL RECORD EVIDENCE.

Plaintiffs' second basis for challenging the *Redetermination* is that, regardless of whether Commerce looked to the correct period of time for determining whether to employ its hyperinflationary methodology, record evidence shows that hyperinflation actually did cause distortions in Ferbasa's reported cost-of-materials which require adjustment. In contrast to Plaintiffs' first argument, which concerned an alleged practice, or methodology, that Commerce used in other investigations, this argument is based on the specific facts at issue in the *Redetermination*.

Before examining the merits of Plaintiffs' factual challenge, the Court notes that the adjustments requested by Plaintiffs are not without pre-

[7] Moreover, and as noted earlier, Commerce's approach in this case is consistent with that taken in at least one other administrative review, *Silicomanganese from Brazil; Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 37,869, 37,876 (1997). There, Commerce similarly broke the period of review into two segments in light of the fact that the respondent only needed to report price and cost data for a six-month period.

[8] As for the question of whether Commerce's actions were also in accordance with law, the Court notes that "[t]here is no statutory directive for measuring the effects of inflation in an antidumping analysis." *Asociacion Colombiana de Exportadores de Flores v. United States*, 6 F. Supp.2d 865, 873 (1998). Accordingly, the Court does not find (nor, for that matter, have Plaintiffs alleged) that Commerce has violated any specific statutory mandate in looking at factors besides the inflation rate in Brazil for the *entire* period of review in deciding whether to employ its hyperinflationary methodol-
ogy.

cedent in Commerce's antidumping investigations. Effectively, Plaintiffs request that Commerce adjust Ferbasa's direct material costs to reflect the fact that, although the six-month reporting period itself was not hyperinflationary, some of Ferbasa's material inputs were purchased during a period of hyperinflation. In at least two other investigations, Commerce has made such an adjustment.

First, in *Silicon Metal From Brazil; Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke in Part* ("*Silicon Metal From Brazil*"), 62 Fed. Reg. 1,970 (1997), Commerce found that the respondents' cost-of-materials for the first several months of the period of review showed significant fluctuations, and that "[t]hese fluctuations occurred because these respondents consumed inventory which they had purchased during a period of hyperinflation." *Silicon Metal From Brazil*, 62 Fed. Reg. at 1,972. As Commerce explained, "[b]ecause the [respondents'] reported costs of materials included the cost of the beginning inventory based on historic costs, these amounts were understated by the rates of inflation that occurred from the date of purchase until June 30, 1994 [the day before the period of review began]." *Id.* Accordingly, Commerce requested information on the "purchase dates, quantities, and amounts recorded in [the respondents'] July 1, 1994 beginning inventory," so that it could revalue this inventory to account for hyperinflation. *Id.*

Second, in *Final Determination of Sales at Not Less Than Fair Value; Paint Filters and Strainers From Brazil ("Paint Filters and Strainers From Brazil"),* 52 Fed. Reg. 19,181 (1987), Commerce made adjustments to a respondent's cost-of-production to account for inflation that occurred before the period of review. In this investigation, although the Brazilian inflation rate over the six-month period of review (February 1, 1996, through July 31, 1996) was clearly not hyperinflationary, Brazil did experience hyperinflation up until that time. *See Paint Filters and Strainers From Brazil*, 52 Fed. Reg. at 19,184 ("The Cruzado plan was introduced as of February, 1986, and marked the end of the hyperinflationary period."). In light of this fact, Commerce adjusted "[t]he cost of paper produced in the period prior to February, 1986 * * * to reflect the replacement cost when used in a later month's production." *Id.* In so doing, Commerce explicitly rejected the respondent's argument that it was Commerce's policy to only use replacement costs when the inflation rate exceeds 50 % *during* the period of review. *Id.*

Notwithstanding these precedents, in this investigation Commerce decided not to make a similar adjustment to Ferbasa's reported costs. As discussed in the "Background" section above, Commerce explained its decision on both institutional and factual grounds, essentially stating that neither its institutional practice, nor the record evidence before it, justified replacing Ferbasa's reported costs with replacement costs. Upon close review, however, the Court does not find Commerce's explanation to be supported by substantial record evidence.

1

COMMERCE HAS NOT ADEQUATELY EXPLAINED WHY IT NO LONGER ACCOUNTS FOR INVENTORY WHICH, THOUGH CONSUMED DURING A NON-HYPERINFLATIONARY PERIOD, WAS ACTUALLY PURCHASED DURING A PERIOD OF HYPERINFLATION.

As part of its justification of not substituting Ferbasa's reported costs with replacement costs, Commerce stated the following:

> AIMCOR asserts that Ferbasa's reported cost data was distorted by hyperinflation because materials used in production during the six-month reporting period were actually purchased in a hyperinflationary period prior to the cost reporting period. The Department's practice is to determine whether an economy is hyperinflationary based on the rate of inflation during the relevant reporting period. *Thus, we do not shift the reporting period to account for inflation in a period prior to the reporting period (i.e. to account for purchases consumed during the reporting period that were purchased prior to that period). Since the level of inflation for this period is not hyperinflationary, we have rejected AIMCOR's argument that Ferbasa's costs are distorted by hyperinflation.*

Redetermination at 19–20 (emphasis added).

On its face, this explanation appears to directly contradict the approach Commerce took in both *Silicon Metal From Brazil* and *Paint Filters and Strainers From Brazil*. As noted above, in these investigations, Commerce found it necessary to adjust certain historic costs reported by the respondents to account for the fact that some materials used for final sales during the periods of review were purchased prior to these periods, during times of hyperinflation. In fact, in *Paint Filters and Strainers From Brazil*, Commerce explicitly rejected the argument that "the Department's policy [is] to use replacement cost only when the inflation rate exceeds 50 percent *during the period of investigation*." *Paint Filters and Strainers From Brazil*, 52 Fed. Reg. at 19,184 (emphasis added). Based on above quoted explanation, however, Commerce appears to have departed from this approach in the *Redetermination* and taken the position that, regardless of the facts before it, Commerce will not consider the effects of hyperinflation on inventory purchased prior to the period under review.[9]

As discussed previously, in its administration of the antidumping law, Commerce need not be forever wedded to a policy or practice that it employed in prior investigations. Before departing from a prior practice, however, Commerce must articulate the reasons why a departure is appropriate, and the explanation it provides must be supported by substantial record evidence and otherwise be in accordance with law.

In this case, Commerce has not provided such an explanation. Rather, it has simply made conclusory statements such as "we do not shift the

[9] Absent further explanation, Commerce's new practice of not accounting for purchases prior to the reporting period also appears to conflict with Commerce's stated purpose of making hyperinflationary adjustments, which is to avoid "distortions in dumping margin calculations [which] can occur where costs incurred in one period are compared to sales prices from a later period when nominal currency values have fallen significantly." *Redetermination* at 3.

reporting period to account for inflation in a period prior to the reporting period" and "[s]ince the level of inflation for this period is not hyperinflationary, we have rejected AIMCOR's argument that Ferbasa's costs are distorted by hyperinflation." *Redetermination* at 19–20. Because these general policy statements do not set forth any reasons *why* Commerce believed it appropriate to depart from its former practice, its allegedly new "practice" of not accounting for purchases consumed during the reporting period that were made prior to that period, without more, cannot serve as a basis for refusing to make the adjustments requested by Plaintiffs (assuming, of course, that such adjustments are otherwise appropriate).

In light of the foregoing, the Court remands this case for further consideration by Commerce. Commerce is instructed to either (a) conform its practice in this case to that used in *Silicon Metal From Brazil*, 62 Fed. Reg. 1,970 (1997), and *Paint Filters and Strainers From Brazil*, 52 Fed. Reg. 19,181 (1987), for determining whether to make necessary adjustments to account for the effects of hyperinflation on some or all of a respondent's reported costs, or (b) explain why it was appropriate for Commerce to depart from its former practice in this investigation. In so doing, Commerce may consider those statutory provisions which underlie Commerce's use of its hyperinflationary methodology, and discuss how Commerce's practice in this case constitutes a reasonable interpretation of these statutes.[10]

2

COMMERCE ERRED IN ITS ASSUMPTIONS SURROUNDING HYPERINFLATION IN AUGUST 1994 AND FERBASA'S 37-DAY INVENTORY TURNOVER PERIOD.

In addition to this new institutional "practice," Commerce appears[11] to have based its decision not to make hyperinflationary adjustments on

[10] Although, as noted previously, "[t]here is no statutory directive for measuring the effects of inflation in an antidumping analysis," *Asociacion Colombiana*, 6 F. Supp.2d at 873, Commerce's practice of making adjustments to account for inflation and hyperinflation appears to be based on its interpretation of various statutes. *See, e.g., Redetermination* at 21 (citing the requirement, codified in 19 U.S.C. § 1677b(e) (1994), that "the constructed value of imported merchandise shall be an amount equal to the sum of—(1) the cost of materials and fabrication * * * during a period which would ordinarily permit the production of the merchandise in the ordinary course of business * * *."); *Final Results*, 61 Fed. Reg. at 59,408 (citing the requirement in 19 U.S.C. § 1677b(f)(1)(A) that "[costs shall normally be calculated based on the records of the exporter * * * if such records are kept in accordance with the generally accepted accounting principles of the exporting country * * * and reasonably reflect the costs associated with the production and sale of the merchandise." *See also* 19 U.S.C. § 1677b(b)(3)(A) (1994) (stating that the cost-of-production shall equal "the cost of materials * * * during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business"); 19 U.S.C. § 1673 (1994) (imposing on Commerce an obligation to impose duties that offset the margin of dumping).

Upon remand, if would be helpful if Commerce would clarify which of these, or other, statutory bases underlie its use of a hyperinflationary methodology in appropriate cases, and why Commerce's decision not to account for purchases prior to the reporting period in this case constitutes a reasonable interpretation of these statutes.

[11] The Court uses the word "appears" because, on its face, Commerce's reasoning in the *Redetermination* is not entirely clear. On page 19 of the *Redetermination*, Commerce states what appears to be a clear institutional position: "we do not shift the reporting period to account for hyperinflation in a period prior to the reporting period * * *." Despite making this categorical statement, however, Commerce appears to have relied upon record evidence concerning actual price distortions and inflation outside of the six-month reporting period in reaching its decision. *See Redetermination* at 4 (stating, in the draft results, that "we have determined that the application of this hyperinflationary economy methodology is not appropriate in calculating Ferbasa's COP because the six-month reporting period was not hyperinflationary, *and* there is no indication that the costs reported by Ferbasa were in any way distorted by hyperinflation.") (emphasis added); *id.* at 20 n.5 (discussing inflation during the 37-day turnover period prior to the reporting period). Such actions indicates to the Court that, despite its categorical statement about not looking outside the reporting period, Commerce's decision not to make any adjustment was also based upon the facts in this case (which, it found, did not show any price distortions). Thus, the Court finds it appropriate to review Commerce's treatment of the record evidence, since Commerce's findings concerning this evidence appear either to have supported, or served as an alternative basis for, its decision.

record evidence which, it found, did not show that Ferbasa's prices had been distorted. Important in this determination, in both the *Final Results* and the *Redetermination*, was the fact that Ferbasa had a 37-day finished good inventory period. For instance, in the *Final Results*, Commerce stated:

> Petitioners' arguments that raw materials consumed during the segment of the review period where costs are calculated may have been purchased during a period of hyperinflation is speculative and not supported by facts on the record of this case. The home market sales in question occurred fully two months after the period of hyperinflation ended. *We concluded that, based upon the company's inventory turnover rate of approximately one month, Ferbasa produced ferrosilicon for these sales at most approximately one month earlier (i.e., at a time when the Brazilian economy was not hyperinflationary). Therefore, because the record supports the conclusion that sales in question were produced in a non-hyperinflationary period, we can reasonably conclude, absent evidence to the contrary, that the costs were not distorted by hyperinflation.*

Final Results, 61 Fed. Reg. at 59,408 (emphasis added). In the *Redetermination*, Commerce similarly continued to attach significant importance to this measurement, stating that "even if the Department were to include the 37-day finished good inventory period, the rate of inflation during this period would not exceed 50 percent." *Redetermination* at 20. Elaborating in a footnote, Commerce remarked that "[a]lthough the actual inventory turnover period is 37 days, the month of August covers 31 of the 37 days. It is therefore reasonable to state that the September costs are based on August prices." *Id.* at 20 n.5.

While facially well-reasoned, two of the principal assumptions underlying Commerce's analysis appear to be incorrect. First, and as Plaintiffs have repeatedly made clear, not only did Brazil experience hyperinflation through July of 1994, but record evidence indicates that inflation continued at a hyperinflationary rate through August of 1994. *See, e.g.*, Brief In Support Of Plaintiffs' Motion For Judgment Upon The Agency Record at 12 & n.41 (citing Ferbasa's Cost Questionnaire Response of March 1, 1996, for the assertion that the monthly inflation rate for August 1994 was 7.06 %); Reply Brief In Support Of Plaintiffs' Motion For Judgment Upon The Agency Record ("Plaintiffs' Reply") at 6–7 (noting that the administrative record contains two inflation indices which show inflation rates for August 1994 of 7.56 % and 7.06 %).[12] On remand, however, Commerce only considered this record evi-

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[12] An inflation rate of 7.06 % for the month of August translates into a 84.72 % annual inflation rate (calculated as 7.06 x 12 months, non-compounded), which is well above Commerce's 50 % hyperinflationary threshold. *See Carbon Steel Pipe From Turkey*, 62 Fed. Reg. at 51,630 ("[A]lthough Import Administration Policy Bulletin No. 94.5 states that 'an economy is deemed to be hyperinflationary if its monthly or annual inflation rates are greater than 5 percent and 60 percent, respectively,' in recent cases we have considered inflation rates lower than 60 percent to warrant application of our high-inflation methodology to avoid the distortions that may be caused by such inflation.").

dence in passing,[13] and nonetheless concluded that hyperinflation in Brazil "continued through July 1994." *Redetermination* at 6.

Assuming, as appears to be the case, that Brazil did experience hyperinflation through August 1994, Commerce's own logic dictates that Ferbasa's costs for September 1994 were distorted by purchases made in August and late July of that year. As noted above, in the *Redetermination*, Commerce found that "[a]lthough the actual inventory turnover period is 37 days, the month of August covers 31 of the 37 days. It is therefore reasonable to state that the September costs are based on August prices." *Id.* at 20 n.5. Following this logic, the fact that Brazil experienced hyperinflation in both July and August of 1994 would indicate that September costs were, in fact, based on purchases made during a hyperinflationary period (late July and August 1994); a conclusion which undermines Commerce's finding that no hyperinflationary adjustments are needed.

Second, and even more fundamentally, Commerce also appears to have erred in its assumptions concerning Ferbasa's inventory turnover period. In the *Redetermination*, Commerce appears to have assumed that the 37-day inventory turnover period meant that Ferbasa's material inputs were purchased, processed and sold, on average, within a 37-day period—thus meaning that the ferrosilicon Ferbasa sold in September 1994 was produced from inputs purchased in late July or August of 1994. *See id.* ("It is therefore reasonable to state that the September costs are based on August prices.").[14] In their Reply, however, Plaintiffs point to two places in the record where Ferbasa made clear that the 37-day inventory turnover period is the average time during which Ferbasa turned over its *inventory of ferrosilicon, the final product*, and not the period during which Ferbasa turned over its *inventory of materials used in producing ferrosilicon*. *See* Plaintiffs' Reply at 7 and n.22. Specifically, in response to Commerce's request that it "[d]escribe how the foreign like product is stored prior to sales and provide the average length of time in inventory prior to sale," Ferbasa stated that 37 days was the "average inventory turnover period for ferrosilicon." Ferbasa's Questionnaire Response of Sept. 21, 1995, A.R. Fiche No. 17 at 55. Likewise, and in response to a similar question, Ferbasa stated that "[t]he average period in inventory for ferrosilicon is 37 days." *Id.* at 6.

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[13] On remand, the only place where Commerce considered inflation in August 1994 was in stating that "even if the Department were to include the 37-day finished good inventory period [*i.e.*, August 1994], the rate of inflation during this period [August 1994 through February 1995] would not exceed 50 percent, and therefore, would not be considered hyperinflationary." *Redetermination* at 20 (footnote omitted). That inflation in August 1994 would not have caused the seven-month period August 1994—February 1995 to be hyperinflationary, however, says nothing about whether inflation in this month was hyperinflationary and, more importantly, whether hyperinflation in August 1994 distorted any of Ferbasa's reported costs.

[14] In fact, throughout the *Final Results* and the *Redetermination*, Commerce appears to have had various interpretations of what the 37-day inventory turnover period represents. *See Final Results* 61 Fed. Reg. at 59,408. ("[B]ased upon [Ferbasa's] inventory turnover rate of approximately one month, Ferbasa produced ferrosilicon for these sales at most approximately one month earlier * * *."); *Redetermination* (draft results) at 5 ("The finished goods inventory period represents the period between the time when raw materials are actually purchased and the time in which those materials enter the production process"). Not only do both these statements appear to conflict with the record evidence concerning the 37-day turnover period, but they also appear to be inconsistent with Commerce's later statement that (in light of the 37-day turnover period) "[i]t is therefore reasonable to state that the September costs are based on August prices." *Redetermination* at 20.

Based on the foregoing record evidence, the Court finds Commerce's conclusion, that Ferbasa's reported costs for September 1994 were based upon August 1994 input prices, not to be supported by substantial record evidence. Assuming, as seems reasonable, that Ferbasa purchased its material inputs more than a few days before they were processed into ferrosilicon,[15] the record evidence concerning the 37-day average inventory period indicates that the inputs Ferbasa used to produce the ferrosilicon sold in September 1994 were likely purchased in July of 1994, if not earlier. Further, since Commerce itself has found that Brazil suffered hyperinflation during July 1994, *see Redetermination* at 6, it is fair to assume—absent evidence to the contrary—that at least some of Ferbasa's reported costs for the six-month reporting period were distorted by hyperinflation. This, of course, is directly contrary to the presumption Commerce appears to have employed in the *Final Results* and the *Redetermination*. *See, e.g., Final Results*, 61 Fed. Reg. at 59,408 ("[B]ecause the record supports the conclusion that sales in question were produced in a non-hyperinflationary period, we can reasonably conclude, absent evidence to the contrary, that the costs were not distorted by hyperinflation.").

Upon remand, Commerce is instructed to reexamine the relevant record evidence concerning Brazilian inflation in August 1994 to determine, based upon the Department's established standards for measuring hyperinflation, whether this period of time should be considered "hyperinflationary." Similarly, Commerce is to reexamine the relevant record evidence concerning Ferbasa's 37-day inventory turnover period for ferrosilicon and reconsider, in light of this and other record evidence,[16] whether it still believes that Ferbasa's reported costs for September 1994 were based upon August 1994 input prices. In light of its analysis of this and other record evidence, Commerce is to reconsider whether some of Ferbasa's reported costs for the six-month reporting period were distorted by hyperinflation which occurred before September 1994 and, if so, whether all or some of Ferbasa's costs of production should be adjusted to account for such distortions.

3

A FURTHER REMAND IS NECESSARY SO THAT COMMERCE MAY RECONSIDER ALL THE RECORD EVIDENCE AS TO WHETHER FERBASA'S REPORTED COSTS WERE DISTORTED BY HYPERINFLATION.

In addition to attacking Commerce's factual assumptions concerning the hyperinflationary period in Brazil and Ferbasa's inventory turnover

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[15] At oral argument, the parties represented that the record contains no evidence as to the production processes that were used, whether any intermediate processing steps were required, or how long the production process averaged.

[16] To the degree that the record currently contains insufficient evidence concerning the turnover period of Ferbasa's inventory of raw inputs (*i.e.*, the period between Ferbasa's purchase of its inputs and the time of their sale as processed ferrosilicon), Commerce may, of course, request such information at its discretion. *See* 19 C.F.R. § 351.301(c)(2) (1999) (allowing the Secretary of Commerce to request factual information at any time during a proceeding). Similarly, and based on the representation of Defendant's counsel at oral argument, the Court recognizes that Commerce may have to reopen the administrative record and request replacement cost information from Ferbasa, should it deem it appropriate to make hyperinflationary adjustments to account for the effects of hyperinflation on some or all of respondent's reported costs.

period, Plaintiffs also argue that "the record in this review demonstrates that the direct materials costs reported by Ferbasa are severely distorted by hyperinflation." Plaintiffs' Reply at 8. Through their submissions, Plaintiffs identify the following as ways in which, it claims, "clear and convincing record evidence," *id.* at 10, demonstrates that the direct material costs reported by Ferbasa were severely distorted by hyperinflation:

- During the September 1994 through February 1995 reporting period, Ferbasa's monthly, per-unit, direct material costs "steadily increased **[confidential information deleted]** *Id.* at 8. In comparison, Plaintiffs note, the inflation rate for this six-month period was less than 10 %. *Id.*
- Over the six-month reporting period, Ferbasa's monthly direct electricity costs increased **[confidential information deleted]** for this period. *Id.* at 8–9. In comparison, Ferbasa's reported direct material costs **[increased at over]** the rate of inflation. *Id.* at 9.
- For all six months for which Ferbasa reported costs, the value of its direct materials purchased **[was different from]** the value of its direct materials consumed. *Id.* at 9. And, while these figures do not account for quantities purchased, "in order for differences in quantities to explain the **[confidential information deleted]** differences in these values, Ferbasa would have to have purchased **[different]** monthly quantities of direct materials for use in ferrosilicon production than Ferbasa consumed in the same months in producing ferrosilicon." *Id.* at 9–10.
- During the period September through December 1994, "the monthly differences between the value of direct materials purchased and the value of direct materials consumed uniformly are very large **[confidential information deleted]** *Id.* at 10. For the last two months of the review period, however, the monthly differences decreased **[confidential information deleted].** *Id.* According to Plaintiffs, "[t]here decreases in the monthly differences * * * show that by the end of the six-month reporting period, Ferbasa had used most of the direct materials purchased during the hyperinflationary period in production." *Id.*

In the *Redetermination* Commerce briefly considered, and rejected, Plaintiffs' arguments concerning the total values of its direct materials purchased and consumed, stating that because "the values cited by AIMCOR appear to reflect total consumption value and total purchases value without regard to quantities. Therefore, these figures are irrelevant to any analysis of distortion of cost data resulting from inflation." *Redetermination* at 20 (citation omitted). While the Court is sympathetic to Commerce's concerns about the weight that should be given this evidence, the Court does not find Commerce's determination that this data is "irrelevant" to be supported by substantial record evidence. Although, in the *Redetermination*, Commerce found that Plaintiffs had

failed to show that some of Ferbasa's prices had been distorted by hyperinflation, it did so in light of its presumption that Ferbasa did not purchase any inputs used during the six-month reporting period at a time of hyperinflation. As discussed above, however, not only does this presumption appear to be incorrect, but the record evidence concerning hyperinflation in August 1994 and the 37-day inventory turnover period appear to demonstrate that Ferbasa *did* purchase at least some inputs during a hyperinflationary period. Further, the Court notes that while "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence," *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966), in this case Commerce did not articulate an alternative explanation for why the value of Ferbasa's direct materials purchased might have exceeded the value of its direct materials consumed. Rather, and apparently in light of its incorrect presumptions, Commerce simply found this data to be "irrelevant."

In light of these considerations, the Court finds it possible, if not probable, that had Commerce reviewed Ferbasa's figures in light of this "correct" presumption, it would have viewed this record evidence as confirming the need to make some hyperinflationary adjustments. Thus, upon remand, Commerce is to reconsider this record evidence in light of what appear to be the "correct" presumptions concerning hyperinflation in August 1994 and Ferbasa's inventory turnover period for its material inputs. Specifically, Commerce should address the issue of whether the record evidence concerning the total value of Ferbasa's purchases and cost-of-materials constitutes *at least some* evidence of price distortions. Should Commerce continue to view these figures as "irrelevant" since they "reflect total consumption value and total purchases value without regard to quantities," *Redetermination* at 20, it should be specific in stating why it believes this data to be entirely unreliable. Similarly, should Commerce find an alternative explanation for these figures than that provided by Plaintiffs, Commerce should be specific in describing this alternative explanation and the basis for it.

As for the record evidence identified by Plaintiffs concerning Ferbasa's **[confidential information deleted]** increase in per-unit, direct material costs over the six-month reporting period, the Court notes that, on its face, this data appears to support Plaintiffs' contention that hyperinflation distorted Ferbasa's reported costs. The **[confidential information deleted]** increase in Ferbasa's per-unit costs over the six-month reporting period appears to provide strong evidence that Ferbasa's reported costs were distorted by hyperinflation and that appropriate adjustments may be necessary. Commerce, however, did not discuss this record evidence in either the *Redetermination* or the *Final Results*.

Simply put, such a total failure to consider or discuss data which, on its face, undermines the position Commerce took in the *Redetermination* is unreasonable. *See Olympia Industrial, Inc. v. United States*,

7 F. Supp.2d 997, 1002 (CIT 1998) ("Commerce's decision to reject the data without further investigation or explanation is not reasonable in view of the statute's mandate to reach the most accurate result."); *see also Usinor Sailor v. United States*, 955 F. Supp. 1481, 1488 (CIT 1997) ("The Court finds that it is unreasonable for Commerce to look only to the intent of the French government and its control over the state-owned firm when there is other economic evidence in the administrative record that Commerce easily could have considered."), *aff'd in part and rev'd in part on other grounds*,[17] 1999 WL 641231 (Fed. Cir., Aug 24, 1999). Thus, on remand, Commerce is instructed to consider the record evidence concerning Ferbasa's significant increase in per-unit, direct material costs over the six-month reporting period and discuss whether, and to what extent, this constitutes evidence of price distortions due to hyperinflation.

IV

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion For Judgment Upon The Agency Record is partially granted and partially denied. This case is remanded to Commerce so that it may correct its errors and provide further explanations consistent with this opinion. In all other respects, Commerce's *Redetermination* is sustained.

(Slip Op. 00–18)

SOLVAY FLUORIDES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 98–06–02280

[Defendant's Motion for Summary Judgment is granted; Plaintiff's Motion for Summary Judgment is denied.]

(Dated February 17, 2000)

Phelan & Mitri, (Michael F. Mitri) for Plaintiff.

David W. Ogden, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Bruce N. Stratvert); Chi S. Choy*, Of Counsel, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for Defendant.

I

INTRODUCTION

WALLACH, *Judge:* Plaintiff Solvay Fluorides, Inc. ("Solvay") challenges Customs' classification of its merchandise, trifluoroacetic acid

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[17] Although the Federal Circuit ultimately reversed the trial court for substituting its judgment for that of Commerce (after the trial court weighed the economic evidence), it did not reverse on the grounds that the trial court erred in ordering Commerce to consider such relevant evidence. Rather, in dicta, the appellate court provides implicit support for the initial decision to remand, noting that the record evidence the trial court instructed Commerce to consider was "clearly relevant" to the question at hand. *See Usinor Sacilor*, 1999 WL 641231 at *3 n.3 (stating that "all of the [economic] evidence that [Commerce] considered on remand pre-dated the bestowal of the subsidies and is therefore clearly relevant to an assessment of the likely beneficiaries of the subsidies at the time of their bestowal").

("TFA"). This Court has jurisdiction under 28 U.S.C. § 1581(a) (1994), and Customs' classification decision is therefore subject to de novo review pursuant to 28 U.S.C. § 2640(a) (1994).

This case comes before the Court on cross-motions for summary judgment pursuant to USCIT Rule 56. The Court finds that no genuine issues of material fact exist, and that the Defendant is entitled to judgment as a matter of law. Therefore, the Defendant's Motion for Summary Judgment is granted, and the Plaintiff's Motion for Summary Judgment is denied.

II

BACKGROUND

Plaintiff is the importer of record of the TFA at issue. TFA is a saturated acyclic monocarboxylic acid imported by the Plaintiff from Germany. Defendant's Statement of Additional Material Facts as to Which There is No Genuine Issue to be Tried ("Defendant's Additional Statement") at ¶ 2; Plaintiff's Response to Defendant's Statement of Additional Material Facts as to Which There is No Genuine Issue to Be Tried ("Plaintiff's Response to Defendant's Additional Statement") at ¶ 2; Plaintiff's Statement of Material Facts as to Which it Contends There Is No Genuine Issue to Be Tried ("Plaintiff's Statement") at ¶ 10; Defendant's Response to Plaintiff's Statement of Material Facts ("Response to Plaintiff's Statement") at ¶ 10.

Customs classified the TFA under subheading 2915.90.18 of the Harmonized Tariff Schedule of the United States (HTSUS). That subheading carries a rate of duty of 4.2% *ad valorem*. Solvay contends that TFA should be classified under HTSUS 2915.21.00 with a duty rate of 1.8% *ad valorem*, or, alternatively, 2915.29.50, with a duty rate of 2.8% *ad valorem*.[1]

III

STANDARD AND SCOPE OF REVIEW

Summary judgment shall issue when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affi-

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[1] Heading 2915 of the HTSUS reads:

2915	Saturated acyclic monocarboxylic acids and their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives:
* * * * * * *	
	Acetic acid and its salts; acetic anhydride:
2915.21.00	Acetic acid
* * * * * * *	
2915.29	Other:
* * * * * * *	
2915.29.50	Other.
* * * * * * *	
2915.90	Other
	Acids
* * * * * * *	
	Other:
* * * * * * *	
2915.90.18	Other.

davits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT Rule 56(d). *Anderson v. Liberty Lobby*, 477 U.S. 242, 247–48 (1986).

The parties agree as to all facts material to the classification of TFA. They agree that TFA is a saturated acyclic monocarboxylic acid. Defendant's Additional Statement at ¶ 2; Plaintiff's Response to Defendant's Additional Statement at ¶ 2. They further agree that TFA is related to acetic acid, but is not itself acetic acid. Defendant's Additional Statement at ¶¶ 5, 14; Plaintiff's Response to Defendant's Additional Statement at ¶¶ 5, 14. These facts establish the proper classification.

The Court has a duty to find the correct classification of the merchandise. *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). There is a statutory presumption of correctness in favor of the Government's classification. 28 U.S.C. § 2639(a)(1). However, the presumption of correctness does not apply to this classification because there is no genuine issue of material fact. *Universal Electronics Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997) ("[A]lthough the presumption of correctness applies to the ultimate classification decision * * * the presumption carries no force as to questions of law."). Therefore, the Court sets about finding the correct classification without any presumption in favor of either party.

IV

ANALYSIS

The parties agree that TFA is a saturated acyclic monocarboxylic acid. Defendant's Additional Statement at ¶ 2; Plaintiff's Response to Defendant's Additional Statement at ¶ 2. The Court finds, and the parties agree, that the proper classification of TFA is therefore within heading 2915, "Saturated acyclic monocarboxylic acids."[2]

The Government argues that the proper classification is subheading 2915.90.18, "Other" saturated acyclic monocarboxylic acids. Under this subheading the imported TFA is subject to a rate of duty of 4.2% *ad valorem*.

The Plaintiff argues that TFA should be classified under the subheading for acetic acid. Within this subheading the Plaintiff advances two alternative arguments. First, it argues that TFA is classifiable as acetic acid itself under subheading 2915.21.00 and thereby subject to a rate of duty of 1.8% *ad valorem*. Alternatively, it says TFA is classifiable as an "Other" acetic acid, salt of acetic acid, or acetic anhydride under subheading 2915.29.50, and thereby subject to a rate of duty of 2.8% *ad valorem*.

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[2] The HTSUS provisions argued by the parties are all within heading 2915. The Court has an independent duty to find the correct tariff classification regardless of the provisions advanced by the parties. *Jarvis Clark*, 733 F.2d at 878 ("[T]he court's duty is to find the correct result, by whatever procedure is best suited to the case at hand."). However, under the stipulated facts before the Court, there is no other HTSUS heading that would provide for TFA.

Statutory analysis leads the Court to agree with the Government. TFA is correctly classified under 2915.90.18, "Other" saturated acyclic monocarboxylic acids.

A

GENERAL RULES OF INTERPRETATION 1 AND 6 REQUIRE CLASSIFICATION UNDER SUBHEADING 2915.90.18 BECAUSE TFA IS NOT ACETIC ACID AND BECAUSE THERE IS AN "OTHER" SUBHEADING IN THE "SERIES OF SUBHEADINGS CONCERNED"

The General Rules of Interpretation (GRI) govern the interpretation and application of the HTSUS. GRI 1 states that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 6 states that "for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and * * * on the understanding that only subheadings at the same level are comparable."

1

BY THE TERMS OF THE HEADINGS AND SUBHEADINGS, TFA CANNOT FALL UNDER THE SUBHEADING "ACETIC ACID" BECAUSE IT IS NOT ACETIC ACID

When reading a series of headings and subheadings in the process of classifying merchandise, the Court must read the series in logical sequence and in accordance with the General Rules of Interpretation. First, the Court looks for a proper heading for the merchandise, following GRI 1. Heading 2915 is titled "Saturated acyclic monocarboxylic acids and their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives." It is undisputed that TFA is a saturated acyclic monocarboxlyic acid. Defendant's Additional Statement at ¶ 2; Plaintiff's Response to Defendant's Additional Statement at ¶ 2. Furthermore, the Court does not find any more specific headings in the tariff schedule, and there are no Explanatory Notes to indicate that any other heading would be correct. Therefore, TFA is classified within heading 2915.

Next, the Court must look for a proper subheading, following GRI 6. Since heading 2915 consists of a series of various levels of subheadings, the Court first looks only at the subheadings indented once. These are the subheadings of the same level and are comparable only to each other under GRI 6. It is from this series of subheadings that the Court must choose. The possibilities are:

1. "Formic acid, its salts and esters;"
2. "Acetic acid and its salts; acetic anhydride;"
3. "Esters of acetic acid;"
4. "Mono-, di- or trichloroacetic acids, their salts and esters;"
5. "Propionic acid, its salts and esters;"
6. "Butyric acids, valeric acids, their salts and esters;"

7. "Palmitic acid, stearic acid, their salts and esters;" and
8. "Other."[3]

The parties agree that TFA is not formic acid; an ester of acetic acid; mono-, di-, or trichloroacetic acid; propionic acid; butyric acid; or palmitic acid. Defendant's Additional Statement at ¶¶ 23, 25–29; Plaintiff's Response to Defendant's Additional Statement at ¶¶ 23, 25–29. The parties further agree that TFA is not a salt of acetic acid or acetic anhydride. Defendant's Additional Statement at ¶ 24; Plaintiff's Response to Defendant's Additional Statement at ¶ 24. Therefore, the Court finds that TFA is not classified under any of the subheadings bearing those titles.

The last remaining choices are "acetic acid" and "other." As stated earlier, the parties agree that TFA is not acetic acid. Defendant's Additional Statement at ¶ 14; Plaintiff's Response to Defendant's Additional Statement at ¶ 14. It therefore cannot be classified under the first of those choices. By elimination, it must be classified under the "other" provision.

Once in the "Other" subheading, the Court must continue the analysis through the other levels of subheadings. The parties agree that TFA is not any of the items listed in the specific subheadings here. Defendant's Additional Statement at ¶¶ 30–31; Plaintiff's Response to Defendant's Additional Statement at ¶¶ 30–31. The parties also agree that TFA is not acetic acid. Defendant's Additional Statement at ¶ 14; Plaintiff's Response to Defendant's Additional Statement at ¶ 14. Therefore, according to GRI 1 and GRI 6, TFA cannot be classified in a subheading for acetic acid. Therefore, the Court finds that TFA can only be classified under the residual "other" provision, 2915.90.18, with the full classification reading as follows:

2915	Saturated acyclic monocarboxylic acids and their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives:
* * * * * * *	
	Acetic acid and its salts; acetic anhydride:
* * * * * * *	
2915.90	Other:
	Acids:
* * * * * * *	
	Other:
* * * * * * *	
2915.90.18	Other.

[3] Each of these items is a subheading indented once below heading 2915.

2

SOLVAY'S ARGUMENT THAT THE EXPLANATORY NOTES TO HEADING 2915 MANDATE CLASSIFICATION AS ACETIC ACID FAILS BECAUSE AN "OTHER" PROVISION EXISTS IN "THE SERIES OF SUBHEADINGS CONCERNED"

The Explanatory Notes[4] for the heading are not binding on the Court, but are guidance for the Court in interpreting tariff provisions. *Mita Copystar America v. United States*, 21 F.3d 1079, 1082 (Fed.Cir. 1994); *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992); H.R. Conf. Rep. No. 100–576, 100th Congress., 2d Sess. 549 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1582.

Plaintiff argues that Subheading Note 1 to Heading 2915 mandates classification of TFA under acetic acid, subheading 2915.21.00. The Note reads:

> Within any one heading of this Chapter, derivatives of a chemical compound (or group of chemical compounds) are to be classified in the same subheading as that compound (or group of compounds) provided that they are not more specifically covered by any other subheading and that there is no residual subheading named "Other" in the series of subheadings concerned.

Explanatory Notes at 342.

Plaintiff argues that this Note mandates that TFA, a derivative of acetic acid, be classified under 2915.21.00 as acetic acid. This argument fails by the authority of the Note itself. This rule of classifying derivatives with their parent chemicals only applies if there is no "other" provision available. The "other" provision employed by Customs in its classification of TFA was within "the series of subheadings concerned" and applies. This result is reached through application of GRI 6, as illustrated above.

B

SOLVAY'S ARGUMENT THAT 2915.21.00 IS AN *EO NOMINE* PROVISION AND THAT THEREFORE ALL FORMS OF ACETIC ACID, INCLUDING TFA, MUST BE CLASSIFIED UNDER ACETIC ACID FAILS BECAUSE THERE IS DEMONSTRATED LEGISLATIVE INTENT THAT THE PROVISION NOT INCLUDE ALL FORMS OF ACETIC ACID

The plain meaning of the statute is enough to find the classification proper under 2915.90.18. However, Plaintiff also argues that 2915.21.00 is an *eo nomine* provision, and that all forms of acetic acid are thus included as acetic acid. This argument fails because a close reading of the tariff heading makes it clear that subheading 2915.21.00 was not intended to include all forms of acetic acid.

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[4] The *Harmonized Commodity Description and Coding System, Explanatory Notes* (2d ed. 1996) ("*Explanatory Notes*") are the official interpretation of the scope of the Harmonized Commodity Description and Coding System (which served as the basis of the HTSUS) as viewed by the Customs Cooperation Council, the international organization that drafted the international nomenclature. Thus, while the *Explanatory Notes* "do not constitute controlling legislative history," they "nonetheless are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting its subheadings." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citing *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992)). The *Explanatory Notes* are "generally indicative of proper interpretation of the various provisions of the [Harmonized Tariff System] * * *." *Lynteq*, 976 F.2d at 699 (quoting H.R. Conf.Rep. No. 100–576 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582.).

Eo nomine provisions are those which list merchandise by a specific name, usually a name well known to commerce. *J. E. Mamiye & Sons, Inc. v. United States*, 509 F.Supp. 1268, 1274 (Cust. Ct. 1980), *aff'd*, 69 C.C.P.A. 17, 665 F.2d 336 (1981). Absent contrary legislative intent, judicial decision, administrative practice, or limitation in the tariff provision itself, and absent proof of commercial designation, *eo nomine* provisions are presumed to include all forms of the article. *See Nootka Packing Co. v. United States*, 22 C.C.P.A. 464, 470 (1935). In this case contrary legislative intent is evidenced in both the tariff schedule and the Explanatory Notes.

Fluorine, present in TFA, is one of five elements known as the halogen group. The others are chlorine, bromine, iodine, and astatine. *Webster's Third New International Dictionary of the English Language Unabridged* at 1023 (1986). In the tariff heading there is a subheading separate from acetic acid for mono-, di-, and trichloroacetic acids, 2915.40. The Explanatory Notes indicate that mono-, di-, and tribromoacetic acids are classified in the "other" category applied in this case by Customs. Explanatory Notes at 385, Note (IX)(d) to Heading 2915. There is no specific subheading or Explanatory Note regarding trifluoroacetic acid.

Subheading 2915.40 specifically provides for acetic acid halogenated by one halogen, chlorine, "Mono-, di-, and trichloroacetic acids." This subheading is indented once, so under GRI 6 it is comparable to the subheading for "Acetic acid." Thus, acetic acid halogenated by chlorine cannot be classified under subheading 2915.21.00, as acetic acid, since to do so would conflict with the statutory scheme.

The Explanatory Notes specifically refer to another halogen, bromine in mono-, di-, and tribromoacetic acids, by stating that such acids are to be classified as "other."[5] There is no indication to this Court that one of the other halogenated acetic acids, here trifluoroacetic acid, should not also be classified as "other," absent a specific tariff subheading such as exists for chloroacetic acids. Plaintiff was unable at oral argument to give the Court any legitimate reason why TFA should not be classified with mono-, di-, and tribromoacetic acid.[6]

If the drafters of the Harmonized Tariff Schedule intended for halogenated acetic acids to be classified with acetic acid, there would not be in-

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[5] Explanatory Notes at 385, Note (IX)(d) to Heading 2915, reads:

> (IX) Other products of this heading include:
>
> * * * * * * *
>
> (d) Mono-, di- and tribromoacetic acids and their salts and esters.

[6] At oral argument the following colloquy occurred after the Court pointed out that bromoacetic acid was specifically listed as "other" under Note (IX)(d):

> Plaintiff's counsel: Right * * * This is addressed specifically by the explanatory notes.
>
> * * * * * * *
>
> The Court: What does that do to your argument?
> Plaintiff's counsel: It doesn't help.
>
> * * * * * * *
>
> The Court: * * * [I]t hurts you badly.
> Plaintiff's counsel: It does. I'm aware of that. Having gotten into the case, we pursued it as best we could for our client, at their direction. But that is correct, I couldn't—my reading of the tariff would follow the same rationale.

Transcript of February 3, 2000 oral argument at 7–8.

cluded in the Explanatory Notes a specific provision regarding mono-, di-, and tribromoacetic acids, and there would not exist a separate tariff section for mono-, di-, and trichloroacetic acids. The logical conclusion from what has been provided is that unless specifically enumerated in a tariff heading or subheading, halogenated acetic acids are to be classified as "other."

This contrary legislative intent prevents subheading 2915.21.00 from including all forms of acetic acid. Therefore, Plaintiff's argument that it is an *eo nomine* provision requiring the inclusion of all forms of acetic acid fails.

V

CONCLUSION

The Court finds that no genuine issues of material fact exist between the parties, and that the Government is entitled to judgment as a matter of law. The Court holds that the GRI and a practical reading of the HTSUS mandate that the proper classification for TFA is subheading 2915.90.18, "Other" saturated acyclic monocarboxylic acids. Therefore, Defendant's Motion for Summary Judgment is granted, and Plaintiff's Motion for Summary Judgment is denied.

(Slip Op. 00–19)

EXPANCEL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 96–06–01519

[Plaintiff's Motion for Summary Judgment denied, Defendant's Cross-Motion for Summary Judgment granted.]

(Decided February 18, 2000.

Sandler, Travis & Rosenberg, P.A. (Paul G. Giguère) for Plaintiff.

David W. Ogden, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office; Commercial Litigation Branch, Civil Division, Department of Justice *(John J. Mahon); Edward N. Maurer*, Office of Assistant Chief Counsel, International Trade Litigation, Customs Service, of counsel, for Defendant.

MEMORANDUM

I. INTRODUCTION

BARZILAY, *Judge:* The issue before the Court in this case is whether microspheres, the product at issue, are acrylic plastics in primary form such that classification in subheading 3906.90.20 of the Harmonized Tariff Schedule of the United States ("HTSUS") by the U.S. Customs Service is correct. The Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a) (1994). For the reasons that follow, the Court finds that the Defendant's classification is correct.

II. BACKGROUND

The product at issue consists of a spherical plastic shell that encapsulates isobutane gas. The microsphere is extremely small, with the diameter ranging from 10–17 microns. Without the aid of a microscope the product appears to be dust. When heat is applied, the isobutane increases the pressure on the plastic shell, softening and expanding it up to 40 times its original volume.

Microspheres may be used as blowing agents, although they are not typical chemical blowing agents, and as light weight fillers.[1] As blowing agents microspheres may be added to printing inks (providing three dimensional patterns on paper), to underbody coatings and sealants (providing controlled expansion and uniform distribution of the cells), to extruding or injection molding[2] (providing better predictability and stability than traditional blowing agents), to shoe soles (providing less weight and greater elasticity to the soles) to paper and board (providing increased thickness and stiffness), and to coating and spraying and impregnation of woven and nonwoven substrates (providing bulk, thickness and resilience).

As a light weight filler microspheres may be used in polyester putties, fine grained spackling compounds, paints, thermosets and cultured marble to reduce density and weight. Microspheres may be used in the cable industry as a low weight additive to liquid petrolatum, which fills the voids between the conductors in the cable, providing varying advantages depending upon the amount by weight that is added and whether added in expanded or unexpanded form.

Customs classified the microspheres under 3906.90.20 HTSUS as "Acrylic polymers in primary forms: * * * Other: * * * Other: * * * Plastics" at a 6.3% duty rate. Plaintiff contends that this classification is incorrect because the statutory phrase "primary forms" does not encompass plastic spheres that contain isobutane, *i.e.*, microspheres. Neither party contends that the prior decision found in *Expancel, Inc. v United States*, 20 CIT 785 (1996), is controlling since the present arguments were not advanced, although the Defendant urges the court to follow that decision.[3]

III. STANDARD OF REVIEW

The parties have cross moved for summary judgment, which is appropriate if "there is no genuine issue as to any material fact * * *." USCIT R. 56(d). The parties agree on the physical characteristics and certain other details of the imported merchandise, but dispute the classification. Based on its review of the undisputed facts, the Court agrees that this case is appropriately resolved through summary judgment.

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[1] A blowing agent is "[a] chemical added to plastics and rubbers that generates inert gases on heating, causing the resin to assume a cellular structure." MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS 232 (4th ed. 1989).

[2] For purposes of uniformity, the Court uses the American spelling throughout the opinion.

[3] Of course, in classification cases res judicata principles do not apply, unless the entries at issue are identical. *See United States v. Stone & Downer Co.*, 274 U.S. 225, 235–37 (1927).

The Court is then left with a purely legal question involving the meaning and scope of the tariff provision and whether it includes the imported merchandise. *See National Advanced Systems v. United States*, 26 F.3d 1107, 1109 (Fed. Cir. 1994). Although there is a statutory presumption of correctness for Customs decisions, 28 U.S.C. § 2639(a)(1), when the Court is presented with a question of law in a proper motion for summary judgment, that presumption does not apply. *Blakley Corp. v. United States*, 22 CIT ____, 15 F. Supp.2d 865, 869 (1998), (citing *Universal Electronics, Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997); *see also Goodman Manufacturing L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) ("Because there was no factual dispute between the parties, the presumption of correctness is not relevant."). Accordingly, the Court proceeds to determine the correct classification of the merchandise.

IV. DISCUSSION

Plaintiff argues that the proper classification of its microspheres is under 3926.90.98 HTSUS providing for "Other articles of plastics and articles of other materials of headings 3901 to 3914: * * * Other: * * * Other" at a 5.3% duty rate. Plaintiff contends that this basket provision is appropriate because it more accurately captures the microspheres since 3906.90.20 HTSUS is limited to acrylic polymers in primary forms.

In a classification case the court begins its analysis by applying the General Rules of Interpretation ("GRI"). GRI 1 states:

> The table of contents, alphabetical index, and titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions[] * * *.

Heading 3906 covers "Acrylic polymers in primary forms." Subheading 3906.90.20 describes other acrylic polymers in primary form of plastic. That the microspheres are an acrylic polymer of plastic is not disputed. Rather, Plaintiff contends that microspheres are not in primary form as that term is defined.

Chapter note 6 explains that "[i]n headings 3901 to 3914, the expression '*primary forms*' applies only to the following forms: (a) Liquids and pastes, including dispersions (emulsions and suspensions) and solutions; (b) Blocks of irregular shape, lumps, powders (including molding powders), granules, flakes and similar bulk forms." Note 6 to Chapter 39, HTSUS. Plaintiff explains that although the microspheres appear to be a powder, in fact they are not and therefore do not fall within the definition of primary forms. Defendant contends that the microspheres are like a powder and that the statute provides for similar bulk forms, thereby capturing the microspheres within the definition of primary form.

"When a tariff term is not defined in either the HTSUS or its legislative history, the term's correct meaning is its common meaning." *Mita*

Copystar America v. United States, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citing *Lynteq, Inc. v. United States*, 976 F.2d 693, 697 (Fed. Cir. 1992)). To ascertain the common meaning the "court may rely upon its own understanding of terms used, and may consult lexicographic and scientific authorities * * *." *Id.* (citing *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed Cir. 1988).

A. Microspheres Are Not Powders.

Defendant attempts to argue that the definition of powder does not exclude products such as Plaintiff's microspheres. Defendant cites the definition of powder as "[a] loose grouping or aggregation of solid particles, usually smaller than 1000 micrometers." MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS 1478 (4th ed. 1989).[4] Defendant offers a second definition of powder as "[a]ny solid matter in a state of minute subdivision; the mass of dry impalpable particles or granules produced by grinding, crushing, or disintegration of any solid substance." 12 OXFORD ENGLISH DICTIONARY 254 (2d ed. 1989). While Plaintiff's products certainly are smaller than 1000 microns they are not solid.

Plaintiff responds with definitions of the term solid as something "without an internal cavity." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1991). Additionally, Plaintiff cites the definition of solids as follows: "1. a. Free from empty spaces, cavities, interstices, etc.; having the interior completely filled in or up. Opposed to hollow. * * * 3. a. Of material substances: Of a dense or massive consistency; composed of particles which are firmly and continuously coherent; hard and compact." 15 OXFORD ENGLISH DICTIONARY 969–70 (2d ed. 1989). It is evident that the microspheres contain a cavity which is filled with a substance, isobutane, having neither a dense nor a massive consistency. Since the microspheres are not solids, they do not satisfy the definition of powder.

B. Microspheres Are Similar Bulk Forms.

Defendant argues that even if the microspheres are not powders, they are still primary forms because they are similar bulk forms. Plaintiff does not dispute that the microspheres are traded in bulk form. Thus the question becomes whether microspheres are in primary form because they are similar to blocks of irregular shape, lumps, powders, including molding powders, granules or flakes.[5] Similar is defined as

[4] Micrometer and microns are interchangeable terms. *See* MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS 1196 (4th ed. 1989)

[5] Plaintiff cites *Anval Nyby Powder AB v. United States*, 157 F.3d 846 (Fed. Cir. 1998) as support for the proposition that its product does not fall within the definition of primary forms. In *Anval*, the court looked to the unifying characteristics of nineteen items defined as unwrought in Additional U.S. Note 2 to Section XV of the HTSUS. *See id.* at 848. The court found that the unifying criterion of the items listed as unwrought was that they did not undergo further processing. *See id.* at 848–49. However, the court found that the product was a similar manufactured form, even though not specifically listed, because it did not undergo further processing. *See id.* at 849.

Plaintiff claims that in the instance case, anything falling within the definition of primary form must undergo further processing, thus microspheres are not in similar bulk form because they are finished products. The Court does not agree that the unifying characteristic at issue in this case involves the stage of processing. Rather, the unifying characteristic found in the Explanatory Notes appears to be that the addition of a primary form product changes the properties of that to which it is added in some desirable manner. *See* discussion *infra*. Even if this were not the case, Defendant has pointed to a number of products that do not undergo further processing but are considered in primary form. *See Def.'s Mem. in Supp. of Def.'s Cross. Mot. for Summ. J. and in Response to Pl.'s Mot. for Summ. J.* at 12.

"[h]aving a marked resemblance or likeness; of a like nature or kind." 15 OXFORD ENGLISH DICTIONARY 490 (2d ed. 1989). Another source gives the definition of similar as "[r]elated in appearance or nature; alike though not identical." AMERICAN HERITAGE DICTIONARY 1141 (2d College ed. 1991).

Both parties cite to the Explanatory Notes to the Harmonized Commodity Description and Coding System (ENs), which are not controlling but nevertheless provide guidance in interpreting the headings and subheadings of the tariff. *See Mita Copystar America*, 21 F.3d at 1082. Of particular interest is the description of powder, granules and flakes:

> In these forms they are employed for molding, for the manufacture of varnishes, glues, etc., and as thickeners, flocculants, etc. They may consist of the unplasticised materials which become plastic in the molding and curing process, or of materials to which plasticisers have been added; these materials may incorporate fillers (e.g. wood flour, cellulose, textile fibres, mineral substances, starch), colouring matter or other substances cited in item (1) above. Powders may be used, for example, to coat objects by the application of heat with or without static electricity.

ENs at 597 (2d ed. 1996).

Plaintiff claims that its product is unique since it is already plastic, does not contain fillers, is not used for the manufacture of varnish, although it could be added to varnish, is not a thickener, and cannot be used as a coating. Defendant contends that the Explanatory Note is expansive evidenced by its repeated use of terms such as for example, and et cetera. The Court agrees with Defendant and finds that the EN is illustrative of the similarity of microspheres to powders, granules and flakes.

Plaintiff's product literature notes that it may be used as a blowing agent, a weight reducer and a property improver. *See Pl.'s Mot. for Summ. J.* at Ex. B-E ("*Pl.'s Br.*"). As discussed above, the purpose of adding the microspheres varies from one product to the next. In general, microspheres provide controlled expansion, uniformity of cell size, even distribution, bulk, resilience and function very well as light weight fillers. *See Pl.'s Br.* at 11, Ex. B-E.

While microspheres are not employed for molding, they may be added to extruding or injection molding or to reaction injection molding. *See Pl.'s Br.* at C. Further, microspheres are not employed for the manufacture of varnishes although they may be added to them, *see Pl.'s Br.* at 8, and are added to paint. *See Pl.'s Br.* at Ex. D. Plaintiff states that microspheres are not used as thickeners, but rather are added to decrease the density of products. However, the EN lists thickeners with flocculants in a nonexclusive manner. A flocculant, or flocculating agent, is "[a] reagent added to a dispersion of solids in a liquid to bring together the fine particles to form flocs." MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS 735 (4th ed. 1989). Flocs are "[s]mall masses formed in a fluid through coagulation, agglomeration, or biochemical reaction of fine suspended particles." MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND

TECHNICAL TERMS 735 (4th ed. 1989). What appears to be common to the list is not a particular result, *i.e.*, thickening or flocculation, rather it is the introduction of the powder, granule or flake into something else causing a change in its properties. The materials before the Court all demonstrate that microspheres when added to another product change its properties, whether by decreasing its density or otherwise.

Further, Plaintiff maintains that isobutane is not a filler, but rather an essential component of the microsphere. If the isobutane were to escape the microsphere could only be described as acrylic plastic waste. Plaintiff contends that fillers "add bulk or strength, but they otherwise present no unique characteristics to the plastic article." *Pl.'s Br.* at 8. Thus, the isobutane is not just a filler, it is an essential component. Yet, isobutane functions similarly to a filler by adding strength. By Plaintiff's definition, the isobutane's function is different from other fillers added to primary forms only by degree. Without isobutane, the microsphere will collapse, other plastics in primary form will retain their shape but have decreased strength or bulk. The EN also notes that materials in Headings 3901–3914 may contain "fillers * * * intended to give the finished products special physical properties or other desirable characteristics." EN at 596. (2d ed. 1996). Isobutane may be essential, in that without it a microsphere does not exist, but its presence undeniably gives the microsphere special physical properties and other desirable characteristics.

Accordingly, the microspheres are captured by the phrase in Note 6 to Chapter 39 "similar bulk form" rendering them within the definition of primary forms. Since application of GRI 1 resolves the correct classification of the merchandise, resort to the remaining GRIs is unnecessary. Defendant correctly classified the microspheres under subheading 3906.90.20 HTSUS.

V. CONCLUSION

For the foregoing reasons, the Court finds that the correct classification of Plaintiff's microspheres is in subheading 3906.90.20 HTSUS. Judgment will enter accordingly.

(Slip Op. 00–20)

KAJARIA IRON CASTINGS PVT. LTD. ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 95–09–01240

[Upon plaintiffs' motion, case remanded again to the International Trade Administration.]

(Dated February 18, 2000)

Cameron & Hornbostel LLP (Dennis James, Jr.) for the plaintiffs.

MEMORANDUM AND ORDER

AQUILINO, *Judge:* The background of this case, which arises out of *Certain Iron-Metal Castings From India: Final Results of Countervailing Duty Administrative Review*, 60 Fed.Reg. 44,843 (Aug. 29, 1995), is set forth *sub nom. Kajaria Iron Castings Pvt. Ltd. v. United States*, 21 CIT ____, 956 F. Supp. 1023, *remand results aff'd*, 21 CIT ____, 969 F.Supp. 90 (1997), *aff'd in part, rev'd in part*, 156 F.3d 1163 (Fed.Cir. 1998), familiarity with which is presumed. In conformity with the mandate of the court of appeals, Senior Judge DiCarlo remanded[1] the case again to the International Trade Administration, U.S. Department of Commerce ("ITA") on the grounds that its

> methodology double counted the subsidies the [plaintiffs] received from the CCS over-rebates, by countervailing both the over-rebates and the section 80HHC deduction attributable to those over-rebates

and that its

> decision to countervail the portion of the section 80HHC deduction attributable to the IPRS rebates on non-subject castings [was] beyond its statutory authority.

156 F.3d at 1180.

During the period under administrative review, the income-tax deduction, an International Price Reimbursement Scheme ("IPRS"), and a Cash Compensatory Support ("CCS") program were in effect in India. According to the record at bar, section 80HHC of the tax law[2] of that land permitted deduction from taxable income of profits derived from exports of merchandise. Simply stated, IPRS reimbursed Indian producers for difference in price between domestic pig iron and that available for less on the world market. CCS rebated indirect taxes and import duties and charges borne by inputs physically incorporated into export

[1] His order per *Kajaria Iron Castings Pvt. Ltd. v. United States*, 22 CIT ___, Slip Op. 99–6 (Jan. 14, 1999), granted leave to return to court to contest the results thereof. The ITA's *Corrected Final Results of Redetermination on Remand* have been duly docketed herein, and the plaintiffs have filed comments on them, along with a motion for oral argument. The latter is hereby denied, given the quality of their written submission and the lack of any response by other parties.

[2] *See Corrected Final Results*, Appendix 1.

product. A producer received the latter upon export, calculated as a percentage of the invoice price of the goods. To the extent the ITA came to conclude that such rebates exceeded the total amount of such charges upon those inputs, it treated the excess (the "over-rebate") as a countervailable subsidy. Because income from exports included IPRS grants and CCS rebates, those benefits had an impact on the deductions pursuant to §80HHC.

In calculating net subsidy to the Indian exporters, the ITA treated the portion of the §80HHC deduction attributable to IPRS rebates as an untied, countervailable subsidy. Rejecting this approach, the Federal Circuit explained that the agency

> erred in countervailing th[at] portion of the * * * deduction * * * because the rebates involved were tied[3] to merchandise not within the scope of the review. * * * On remand, Commerce should eliminate the IPRS rebates in calculating the subsidy received on subject castings through the section 80HHC deduction.

Id. at 1176. The court of appeals also disagreed with the agency's position that countervailing CCS over-rebates and their non-taxation separately does not result in double-counting, concluding that

> Commerce's policy of discounting secondary tax consequences cannot mean that if a producer receives a subsidy that is taxed Commerce will countervail the pre-tax subsidy, but that if a producer receives a subsidy that is not taxed Commerce will countervail the subsidy and the tax that should have been paid if the subsidy were taxed. The circumstances in this case are akin to the latter situation, in that the Producers in effect received the CCS over-rebates tax-free because of the section 80HHC deduction. It was improper for Commerce to countervail both the CCS over-rebates and the tax that would have been paid on th[em] but for the section 80HHC deduction. The reason is that, in so doing, Commerce imposed a countervailing duty that was not "equal to the amount of the net subsidy" in contravention of 19 U.S.C. § 1671(a). * * *
>
> On remand, Commerce should recalculate the subsidy provided by the section 80HHC deduction in a manner that eliminates the double-counting of the CCS over-rebates. * * *

Id. at 1175.

I

In attempted compliance with the Circuit mandate, the ITA remand results now at bar state with regard to IPRS that the

> companies' section 80HHC tax deduction claims are based on their profit on export income. Therefore, for each company, we adjusted the benefit (numerator) by subtracting the amount of tax actually paid from the amount of tax the company would have been liable to pay absent an estimated amount of section 80HHC deduction attributable to profit earned on exports of non-subject merchandise.

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[3] According to the record herein, when a countervailable benefit is tied to the production or sale of a particular product, the ITA will allocate the benefit solely to that product. 60 Fed.Reg. at 44,845.

> We factored [such] profit * * * out of the * * * deduction because IPRS rebates for non-subject merchandise can only influence, and be reflected in, the component of profit earned on non-subject merchandise.
>
> To estimate the amount of the section 80HHC tax deduction attributable to profits earned on exports of non-subject merchandise, we took the ratio of the value of non-subject exports to the value of total exports and applied it to the total amount of the section 80HHC deduction claimed. We considered this result to be the only possible estimate of the amount of section 80HHC tax deduction that is attributable to exports of non-subject merchandise. We subtracted this amount from the total amount of the section 80HHC deduction actually claimed. Because this result is the portion of the section 80HHC deduction that is attributable only to exports of the subject castings, it is not influenced by IPRS rebates.

Corrected Final Results, pp. 3–4 (footnote omitted). Further:

> * * * Because CCS rebates (including the CCS over-rebates) are treated as income, it follows that CCS rebate income contributes to a Producer's profit as all of its income does. In the administrative review, we determined that the CCS over-rebates were provided to the Producers at *ad valorem* rates which varied on a company-by-company basis. Therefore, we assumed that the contribution of the CCS over-rebate income to a company's profit is commensurate with its individual *ad valorem* rate of CCS over-rebate and reduced each company's actual section 80HHC claim accordingly. These two adjustments resulted in a recalculated section 80HHC deduction for each company.

Id. at 4–5. Finally, the ITA explains its approach to that § 80HHC deduction as follows:

> We derived the benefit (numerator) for each company by calculating the tax savings on its recalculated amount of 80HHC deduction. By factoring out the amount of the 80HHC tax deduction attributable to exports of non-subject merchandise * * *, we eliminated any influence that IPRS rebates tied to non-subject merchandise have on the calculation of the benefit * * *. By prorating the section 80HHC deduction in this manner, we derived a new "tied" amount of section 80HHC deduction that is attributable to subject merchandise only. By further reducing this "tied" amount by the rate at which the CCS over-rebates were received, we eliminated from the calculation the profit generated by those CCS over-rebates.
>
> Since the benefit (numerator) is now "tied" to subject merchandise, we followed our standard principles for the attribution of "tied" benefits and factored exports of non-subject merchandise out of the denominator as well. Therefore, we used the value of exports of subject castings as the denominator rather than the value of sales of all exports. This was done to ensure that both the numerator and the denominator reflect values attributable only to subject castings. The calculations remain "apples-to-apples" comparisons * * *.

Id. at 5.

II

The results of this analysis, which are listed at pages 7–8 of defendant's *Corrected Final Results*, must be upheld unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. §1516a(b)(1)(B). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed.Cir. 1984), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The standard requires "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

A

With regard to IPRS, the ITA considers its method of factoring profit on non-subject merchandise out of the benefit calculation to be the "only possible estimate"[4] thereof, which, in actuality, fails to eliminate that program's influence. That is, as the plaintiffs show, that method

> does not even address the IPRS since it uses ratios based on "values" of "exports" * * * when IPRS revenues are not even included in export sales values. The IPRS is grant income received *in addition* to revenue earned on export sales. Therefore, the only way to eliminate the "influence" of the IPRS on the subsidy calculations is to actually deduct the IPRS rebates from income and then calculate the total tax savings based on all exports, i.e., both subject and non-subject castings in the denominator.[5]

Moreover, the plaintiffs assert that, by using only export values to develop the ratios,

> all Commerce * * * is doing is allocating (improperly) the IPRS included in each company's taxable income to both non-subject and subject castings * * * according to export values. * * *
>
> To take an example, if a company sells 200,000 rupees of subject castings and 100,000 rupees of non-subject castings, and receives 30,000 rupees in IPRS for the non-subject castings, all Commerce's ratio approach does is allocate two-thirds of the 30,000 rupees received as IPRS to subject castings and one-third to non-subject. That is, the approach allocates the 30,000 rupees IPRS in the following manner:
>
> 20,000 to subject castings (200,000 subject castings + 100,000 non-subject castings = 300,000 total exports; 200,000/300,000 = 2/3; 2/3

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[4] *Corrected Final Results*, p. 4.

[5] Plaintiffs' Comments on the Commerce Department's Final Results of Redetermination on Remand, pp. 4–5 (emphasis in original). The plaintiffs also note that, if

> Commerce prefers a denominator based on subject castings only, the IPRS must still be deducted from income first. Commerce can then calculate the remaining profit and 80HHC deduction attributable solely to subject castings (the numerator) by using a ratio of the value of subject castings sales to total sales. The denominator may then include subject castings only.

Id. at 5, n. 3.

> x 30,000 IPRS = 20,000); and 10,000 to non-subject castings (100,000/300,000 = 1/3; 1/3 x 30,000 = 10,000).
>
> Hence, the "influence" of the IPRS is still being included in the subject castings since the IPRS allocated to subject castings should be zero, not 20,000.
>
> * * * [A]ll that needs to be done to eliminate the IPRS "influence" from the calculation is to subtract the IPRS from the income used to calculate the 80HHC benefit. Unless all IPRS is deducted from income or profit *first*, the IPRS cannot be eliminated from the calculation as required by the CAFC.[6]

This court is constrained to concur. In attempting to estimate the portion of the §80HHC deduction that is attributable to non-subject exports, the ITA has seemingly lost sight of the guidance of the Federal Circuit. No matter what ratio is used, because export profits (and the resultant §80HHC deduction) reflect both IPRS grants and sales revenue, some IPRS income will still be attributed to subject exports and, hence, countervailed under the agency's methodology. The court of appeals did not require the ITA to estimate profit on non-subject merchandise, only to eliminate IPRS, which it has failed to do.

This court also concurs that the agency, in attempting to estimate the portion of the §80HHC deduction attributable to non-subject exports, has made "what should be a very simple adjustment into a complicated—and erroneous—calculation that thwarts the CAFC's instructions."[7] Even the ITA recognizes that IPRS grants are "clearly treated" as income in financial statements on the record, pointing out, for example, that IPRS receipts are reported as "Reimbursement against Pig Iron" in plaintiff RSI, Ltd.'s financial records. *See Corrected Final Results*, pp. 12–13. Indeed, the court of appeals noted that no complicated subsidy tracing would be required in cases such as this, where the foreign respondents have provided

> documentation that allows Commerce to separate the portion of the tax deduction based on rebates related to non-subject merchandise from the remainder of [the] countervailable tax deduction * * *. Since the Producers provided such data, Commerce should eliminate [] IPRS * * * from the calculation of the subsidy provided by the section 80HHC deduction.

156 F.3d at 1176.

The ITA's attempt to estimate profit on non-subject merchandise must therefore be set aside. This court cannot accept its position that the methodology proposed by the plaintiffs "makes no sense at all" because IPRS is income rather than profit, and simply subtracting the IPRS amount from the §80HHC deduction would result in a negative number several times the value of the deduction. *See Corrected Final*

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[6] *Id.* at 5–6 (emphasis in original).
[7] *Id.* at 6.

Results, p. 13. The plaintiffs concede that a negative number would result in some instances, but deny that this proves any error:

> * * * [A]ll this means is that *but for* the IPRS, the company would have had a loss. In such an instance, the 80HHC subsidy would become zero because all of the otherwise countervailable deduction would be "tied" to the IPRS earned on non-subject castings.[8]

The Federal Circuit similarly noted that IPRS increased export profits by "no more than" the amount of the grants, implicitly accepting plaintiffs' explanation that they may also have tended to offset losses in certain instances. *See* 156 F.3d at 1176.

B

With regard to the CCS over-rebates, the ITA assumed that their contribution to a company's profit was commensurate with its individual *ad valorem* rate therefor and thus reduced the §80HHC claim by that rate. The plaintiffs argue that such reasoning is "flawed" and "does not come close to eliminating all the double-counting", as required by the court of appeals, because the

> countervailable subsidy found from the over-rebate is not a percentage of profit; it is a percentage of total exports. Accordingly, the contribution of the CCS over-rebate to profit can only be determined by multiplying the company's over-rebate rate times total export sales. Eliminating only a percentage of profit does not eliminate all of the CCS that has been separately countervailed.[9]

The CCS program rebated indirect taxes and import duties and charges borne by inputs physically incorporated into an exported product,

> paid upon export and [] calculated as a percentage of the f.o.b. invoice price. * * * [T]he rebate rate for exports of castings was set at a maximum of five percent for the review period.

Certain Iron-Metal Castings from India: Preliminary Results of Countervailing Duty Administrative Review, 60 Fed.Reg. 4,596, 4,598 (Jan. 24, 1995). Hence, the ITA found in prior proceedings that the CCS program *per se* did not provide a countervailable benefit, but noted that it had to

> determine on a case-by-case basis whether there is an over-rebate, i.e., "whether the rebate for the subject merchandise exceeds the total amount of indirect taxes and import duties borne by inputs that are physically incorporated into the exported product." * * * If an over-rebate exists, the difference between the allowable rebate and the actual rebate is a countervailable subsidy.

156 F.3d at 1167–68, quoting 60 Fed.Reg. at 4,598.

The over-rebate rate calculated by the agency is therefore, by definition, also a "percentage of f.o.b. invoice price", calculated upon export.

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[8] *Id.* at 16, n. 10 (emphasis in original).

[9] *Id.* at 19–20.

Hence, the record supports plaintiffs' premise that the subsidy found from over-rebate is a percentage of total exports rather than a percentage of profit. Counsel use the ITA's calculation for plaintiff RSI, Ltd., which had a rate of 0.83%, to illustrate the error in methodology, explaining that, after adjusting its calculations to account for IPRS, the agency found a percentage of profit:

> * * * However, RSI received CCS as a percentage of total exports, not as a percentage of profit. Appendix 3, page 2, of Commerce's Remand Results shows that RSI received "cash assistance," which is the CCS, of * * * rupees. Some of this * * * was countervailed; all of it contributed to profit; and all of it was deducted pursuant to 80 HHC. Hence, in order to eliminate the double counting under 80 HHC, all of the countervailed CCS must be deducted from profit *first*, before calculating the 80 HHC subsidy.[10]

The plaintiffs further explain the error in terms of percentages:

> The total CCS at the time was 5% of export sales; however, only 0.83% was countervailed. This means that 16.6% of the CCS received was countervailed (0.83/5.00 = 16.6%). Thus, 16.6% of the CCS actually received must be eliminated from profits in order to eliminate the double counting. When Commerce reduced RSI's actual 80 HHC claim by an additional 0.83%, Commerce did not eliminate 16.6% of the CCS, it eliminated at most only 0.83% of it.[11]

The court concurs that the record shows that the ITA has failed to eliminate CCS over-rebates from the benefit calculation under §80HHC. They were a percentage of a firm's total exports, so merely reducing profit (and hence the §80HHC deduction) by their over-rebate rate(s) fails to eliminate all of the CCS that was countervailed separately.[12]

III

In view of the foregoing, this case must again be remanded to the ITA for recalculation of the net subsidies to the plaintiffs under §80HHC, using a methodology that complies with the mandate of the court of appeals, eliminating both IPRS grants and the double-counting of CCS over-rebates in a manner not inconsistent with that court's opinion.

The defendant may have 90 days to complete said recalculation and to report the results thereof to this court, where-upon the parties may file written comment(s) thereon within 30 days, with any reply thereto submitted within 15 days thereafter.

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[10] *Id.* at 20 (emphasis in original).

[11] *Id.* at 21.

[12] The agency takes the position, as it did with regard to IPRS, that plaintiffs' suggested approach is erroneous because CCS over-rebates are income rather than profit, and reducing the deduction by such income would result in a negative number. *See Corrected Remand Results*, p. 16. The plaintiffs respond that there is no reason why the §80HHC deduction should equal CCS, since it increases profits "or offsets losses" in the exact amount of the cash received. Plaintiffs' Comments on the Commerce Department's Final Results of Redetermination on Remand, p. 24. The Federal Circuit supports this reasoning, stating that inclusion of the CCS rebates in export income raises export profits by an amount "no greater than" the amount of the rebates. 156 F.3d at 1174.

(Slip Op. 00–21)

CRESCENT FOUNDRY CO. PVT. LTD. ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 95–09–01239

[Upon plaintiffs' motion, case remanded again to the International Trade Administration.]

(Dated February 18, 2000)

Cameron & Hornbostel LLP (Dennis James, Jr.) for the plaintiffs.

MEMORANDUM AND ORDER

AQUILINO, *Judge:* The background of this case, which arises out of *Certain Iron-Metal Castings From India: Final Results of Countervailing Duty Administrative Review*, 60 Fed.Reg. 44,849 (Aug. 29, 1995), is set forth *sub nom. Crescent Foundry Co. Pvt. Ltd. v. United States*, 20 CIT 1469, 951 F.Supp. 252 (1996), *remand results aff'd*, 21 CIT ___, 969 F.Supp. 1341 (1997), *aff'd in part, rev'd in part*, 168 F.3d 1322 (Fed.Cir. 1998), familiarity with which is presumed. In conformity with the mandate of the court of appeals, which was spelled out in its lead decision in *Kajaria Iron Castings Pvt. Ltd. v. United States*, 156 F.3d 1163 (Fed.Cir. 1998), raising identical issues from another period of administrative review, Senior Judge DiCarlo remanded[1] the case again to the International Trade Administration, U.S. Department of Commerce ("ITA") on the grounds that its

> methodology double counted the subsidies the [plaintiffs] received from the CCS over-rebates, by countervailing both the over-rebates and the section 80HHC deduction attributable to those over-rebates

and that its

> decision to countervail the portion of the section 80HHC deduction attributable to the IPRS rebates on non-subject castings [was] beyond its statutory authority.

156 F.3d at 1180.

During the period under administrative review, the income-tax deduction, an International Price Reimbursement Scheme ("IPRS"), and a Cash Compensatory Support ("CCS") program were in effect in India. According to the record at bar, section 80HHC of the tax law[2] of that land permitted deduction from taxable income of profits derived from exports of merchandise. Simply stated, IPRS reimbursed Indian produc-

[1] His order per *Crescent Foundry Co. Pvt. Ltd. v. United States*, 22 CIT ___, Slip Op. 99–5 (Jan. 8, 1999), granted leave to return to court to contest the results thereof. The ITA's *Corrected Final Results of Redetermination on Remand* have been duly docketed herein, and the plaintiffs have filed comments on them, along with a motion for oral argument. The latter is hereby denied, given the quality of their written submission and the lack of any response by other parties.

[2] *See Corrected Final Results*, Appendix 1.

ers for difference in price between domestic pig iron and that available for less on the world market. CCS rebated indirect taxes and import duties and charges borne by inputs physically incorporated into export product. A producer received the latter upon export, calculated as a percentage of the invoice price of the goods. To the extent the ITA came to conclude that such rebates exceeded the total amount of such charges upon those inputs, it treated the excess (the "over-rebate") as a countervailable subsidy. Because income from exports included IPRS grants and CCS rebates, those benefits had an impact on the deductions pursuant to §80HHC.

In *Kajaria Iron Castings Pvt. Ltd. v. United States*, 23 CIT ____, Slip Op. 00–20 (Feb. 18, 2000), this court was constrained to conclude that the ITA's *Corrected Final Results of Redetermination on Remand* filed therein were not yet in conformity with the foregoing mandate of the Federal Circuit, whereupon that case was remanded to the agency for further reconsideration.

Since the *Corrected Final Results* filed herein are based upon the same reasoning, the same relief is necessary. Hence, for the reasons stated in Slip Op. 00–20 in *Kajaria*, this case is hereby remanded to the ITA for recalculation of the net subsidies to the plaintiffs under §80HHC, using a methodology that complies with the mandate of the court of appeals, eliminating both IPRS grants and the double-counting of the CCS over-rebates in a manner not inconsistent with that court's opinion.

The defendant may have 90 days to complete said recalculation and to report the results thereof to this court, where-upon the parties may file written comment(s) thereon within 30 days, with any reply thereto submitted within 15 days thereafter.

(Slip Op. 00–22)

PEER BEARING CO., PLAINTIFF, AND L&S BEARING CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 97–12–02123

(Dated February 22, 2000)

JUDGMENT

TSOUCALAS, *Senior Judge:* On July 21, 1999, this Court remanded to the United States Department of Commerce, International Trade Administration ("Commerce") for correction of a clerical error arising from the final results of the administrative review, entitled *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of Antidumping Administrative Review*, 62 Fed. Reg. 61,276 (Nov. 17, 1997). *See Peer Bearing Co. v. United States*, 23 CIT ____, ____, 57 F. Supp. 2d 1200, 1206 (1999). The Court ordered Commerce to correct the inadvertent reversal of the skilled and unskilled labor rates in its calculation of factors of production and to adjust the dumping margins accordingly. *See id.* at 1203.

On September 17, 1999, Commerce released draft remand results in this action. The Timken Company ("Timken") submitted a comment on the draft remand results. In its comment, Timken argued that recalculation of the dumping margin was unnecessary.

On October 19, 1999, pursuant to the Court's remand order, Commerce filed its *Final Results of Redetermination Pursuant to Court Remand, Peer Bearing Co. v. United States, Court No. 97–12–02123* ("*Remand Results*") (July 21, 1999). In the *Remand Results*, Commerce corrected the clerical error reversing the labor rates and recalculated the margin for the Peer Bearing Company ("Peer"). *Remand Results* at 1, 4.

In its comments on the *Remand Results*, Timken argues (1) that recalculation of the dumping margin was unnecessary, and (2) that Commerce erroneously assigned the corrected rate to Peer, the importer, instead of Chin Jun Industrial Ltd. ("Chin Jun"), the reseller. Accordingly, Timken contends that Commerce's *Remand Results* should not be affirmed.

The Court finds that contrary to Timken's arguments, recalculation of the dumping margin became necessary when Commerce corrected the skilled and unskilled labor rates. Furthermore, the Court finds that it is unnecessary to remand the case to apply the corrected rate to Chin Jun. It is obvious that Commerce had properly calculated and applied the rate to Chin Jun and had inadvertently switched the names of the companies in the *Remand Results*.

Since Commerce has complied with this Court's remand order, it is hereby

ORDERED that the *Remand Results* are affirmed in their entirety, and all other issues having been previously decided, it is further

ORDERED that this case is dismissed.

(Slip Op. 00–23)

FORMER EMPLOYEES OF CHAMPION AVIATION PRODUCTS, PLAINTIFFS *v.* HERMAN, SECRETARY OF LABOR, DEFENDANT

Court No. 98–02–00299

[Secretary of Labor's remand determination affirmed.]

(Decided February 25, 2000)

Dewey Ballantine, L.L.P. (John A. Ragosta, Bradford L. Ward, Michael R. Geroe, David A. Bentley), for Plaintiffs.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Katherine A. Barski), Scott Glabman*, Attorney, Office of the Solicitor, United States Department of Labor, of counsel, for Defendant.

MEMORANDUM

I. INTRODUCTION

BARZILAY, *Judge:* This matter is before the Court following a remand determination by the Secretary of Labor[1] that Plaintiffs are ineligible for trade adjustment assistance under the North American Free Trade Agreement Transitional Adjustment Assistance program ("NAFTA-TAA"). In *Former Employees of Champion Aviation v. Herman*, slip op. 99–48 (June 4, 1999) ("*Champion I*"), familiarity with which is presumed, the Court ordered Labor to reconsider its two prior negative determinations of Plaintiffs' eligibility for NAFTA-TAA. The Court remains dissatisfied with these current results, but is constrained from further action and therefore affirms the remand determination.

II. DISCUSSION

The Court remanded the case to Labor for two reasons. First, the Court was not satisfied that Labor had considered an important aspect of the problem, *i.e.*, whether the statute spoke to a "two-step" shift in production. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). A corollary concern was that the agency did not explain why it did not adopt an arguably consonant interpretation of the statute put forth by the Plaintiffs. *See International*

[1] Once again, the Court uses the terms Secretary and Labor interchangeably.

Union v. Reich, 20 F. Supp. 2d 1288, 1293 (CIT 1998) (quoting *International Union v. Marshall*, 584 F.2d 390, 396 (D.C. Cir. 1978)).

Second, the Court was not satisfied that Labor conducted an adequate investigation. "[T]he nature and extent of the investigation are matters resting properly within the sound discretion of the administrative officials.'" *Former Employees of CSX Oil and Gas Corp. v. United States*, 720 F. Supp. 1002, 1008 (CIT 1989) (quoting *Cherlin v. Donovan*, 585 F. Supp. 644, 647 (CIT 1984)). However, failure by Labor to make reasonable inquiries constitutes good cause to remand for additional evidence gathering. *See Former Employees of Komatsu Dresser v. United States Secretary of Labor*, 16 CIT 300, 303 (1992).

A. The Remand Determination Addresses a Two-step Shift in Production.

In *Champion I*, the Court expressed its concern that Congress' intent was not being fulfilled by Labor's shift in production analysis. *See Champion I* at 7 ("Reliance by the Secretary on product lines alone to determine what constitutes the appropriate subdivision * * * does not effectuate the expressed desire of Congress."). In the negative remand determination, Labor expressed its disagreement with the Court that a new methodology for determining the appropriate subdivision was warranted. *See* SAR 39.[2] While the Court remains wary of potential shortcomings in Labor's analysis, it cannot say that it is clearly at odds with the statute. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984); *see also Kelley v. Secretary, United States Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987) ("A reviewing court must accord substantial weight to an agency's interpretation of a statute it administers."). Despite the Court's initial pronouncement that additional consideration of Congress' intent to expand worker coverage by adding the shift in production component to the statute was required, Labor maintains that the intent to expand the program does not mean Congress intended to abrogate terms with a well-established judicial meaning. *See* SAR at 39. Accordingly, the Court has further examined the legislative history in light of Labor's position and determined that it is not sufficiently clear to enable the Court to determine that Labor's methodology is contrary to Congress' will expressed through use of the term "articles" in the statute. *See Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 233 (1986).

Since the Court is faced with an executive agency's interpretation of a statute it is entrusted to administer, *Chevron* requires first looking at the words of the statute. *See Chevron*, 467 U.S. at 842. Section 222 of the Trade Act of 1974 (*as amended by* NAFTA Transitional Adjustment Assistance Act (19 U.S.C. § 2331 (1994))), contains a provision that provides relief to workers who lose jobs because of a shift in production to Canada or Mexico. *See* 19 U.S.C. § 2331(a)(1)(B). The Secretary of Labor

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[2] Labor did, however, rely on something more than product lines alone to determine what constituted the appropriate subdivision in this instance. *See* discussion *infra* at 7.

is directed to certify workers as eligible to apply for trade adjustment assistance if "there has been a shift in production by such workers' firm or subdivision to Mexico or Canada of *articles* like or directly competitive with *articles* which are produced by the firm or subdivision." *Id.* (emphasis added).

Plaintiffs made a forceful argument that Labor should consider the traditional factors of production, land, labor and capital, in determining what constitutes the appropriate subdivision in a shift in production case. In *Champion I*, the Court expressed its belief that such an approach would be consistent with the statutory purpose of providing relief to workers whose firms or subdivisions shifted production to Canada or Mexico. Plaintiffs argue that the present statutory framework does not account for situations when a shift in production occurs in more than one step. If a company moves production of articles that are neither like nor directly competitive from Plant A to Plant B in the United States and from Plant B to Plant C in Mexico then closes Plant A, the workers in Plant A will not be eligible for trade adjustment assistance even though their jobs were lost through a "two-step" shift in production. Labor asserts that workers at Plant A would not be eligible for trade adjustment assistance because the statute limits the comparison to the articles being produced and requires that they be like or directly competitive. *See* 19 U.S.C. § 2331(a)(1)(B). Plaintiffs respond that the result is absurd and that Congress could not have intended it, and therefore, Labor must look at shifts in land, labor and capital in determining whether a shift in production occurred.

While this is a case of first impression as to the proper interpretation of the shift in production criteria of the statute, the provision at issue contains language that has received judicial construction. The court has interpreted the relevant language in section 222 of the Trade Act of 1974 (19 U.S.C. § 2272) to mean that a "determination of what constitutes the appropriate subdivision must be made along product lines." *Abbott v. Donovan*, 570 F. Supp. 41, 48 (CIT 1983) (and cases cited). Labor maintains that absent clear legislative history to the contrary, Congress, by placing identical language in 19 U.S.C. § 2331(a)(1)(B), is presumed to have adopted these judicial constructions, thereby requiring shifts in production to be measured along product lines. *See Francis v. Southern Pac. Co.*, 333 U.S. 445, 450 (1948); *see also Fluor Corp. & Affiliates v. United States*, 126 F.3d 1397, 1404 (Fed. Cir. 1997). While this is merely a rule of statutory construction, and like any other should yield when the clear purpose of the statute requires it, in this instance the construction sought by Plaintiffs is simply too different absent some indication by Congress that it so intends.

Although the Court has scoured the legislative history, it was unable to find any reference to such an approach. The Employment, Housing and Aviation Subcommittee of the House Committee on Government Operations held hearings on trade adjustment assistance. Although a few statements touch upon the subject, none definitively suggest that

Congress intended to change the program in the manner advocated by the Plaintiffs.

First, it should be noted that the amendments to the trade adjustment assistance portions of the Trade Act of 1974 were intended to be temporary and a comprehensive worker adjustment assistance program was supposed to be implemented later. *See, e.g., Trade Adjustment Assistance: A Failure for Displaced Workers: Hearing Before the Subcomm. on Employment, Housing and Aviation of the House Comm. on Gov't Operations*, 103rd Cong. 103–05, 182 ("*Hearing*"). An administration official testified that the bridge program uses TAA as the legislative vehicle with some significant differences. *See id.* at 182 (statement of Douglas Ross, Assistant Secretary, Employment and Training Administration, U.S. Department of Labor). Importantly, Mr. Ross' prepared statement, along with various fact sheets and the proposed statement of administrative action, note that the NAFTA program was transitional and a precursor to the comprehensive worker readjustment proposal that was to be submitted in 1994. *See id.* at 103–05, 189. To the Court's knowledge a comprehensive plan has not passed Congress, but there is a proposal to consolidate NAFTA-TAA with TAA. *See* H.R. 1491, 106th Cong. (1999).

Nevertheless, the statements indicate that the legislation presented to Congress did not address every aspect of the problems faced by dislocated workers. *See, e.g., Hearing* at 139 (statement of Linda G. Morra, Director, Education and Employment Issues, Human Resources Division, U.S. General Accounting Office) ("As Congress debates NAFTA and considers how best to assist those workers who will be affected, as well as other dislocated workers, it may wish to consider a simplified approach that assists workers regardless of the reason for their dislocation."). The Court is aware of the perils of using witnesses' statements as evidence of Congress' legislative intent. *See, e.g., Heartland By-Products, Inc. v. United States*, 74 F. Supp. 2d 1324, 1336 (CIT 1999). However, in this instance the legislation was submitted by the Clinton Administration, and thus, statements by Ross express Labor's understanding.

Since nothing in the legislative history evinces a clear intent to attribute a different meaning to the term articles, the Court is constrained by the language of the statute to conclude that Labor is acting in accordance with that statute. It is for Congress to address the problem presented by a two-step shift in production and hopefully it will when it consolidates the NAFTA-TAA with TAA. But for now, Labor's position, which is borne out by the language of the statute, precludes providing relief to workers who do not produce articles like or directly competitive with those being produced abroad, although the devastating effect to the worker who loses his or her job is obviously the same as it would have been had the shift in production occurred in one step only.

B. Substantial Evidence Supports Labor's Remand Determination.

In addition to ordering Labor to reconsider its position with respect to two-step shifts in production, the Court also required Labor to provide a

more detailed explanation of whether the articles produced at the Pennsylvania facility were like or directly competitive with those produced in Mexico and to describe the amount and types of equipment that moved from Pennsylvania to Mexico. *See Champion I* at 10. Labor has done so and the Court concludes that the decision now rests upon substantial evidence.

19 U.S.C. § 2395(b) provides that like the initial review, Labor's new or modified findings of fact are conclusive if supported by substantial evidence. Substantial evidence, in turn, "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

In its supplemental investigation, Labor contacted individuals with knowledge of the various facilities and acquired certain Cooper Industry organizational charts. As a result, Labor was able to determine that production equipment did not move from Pennsylvania to Mexico. *See* Supplemental Administrative Record at 23, 43 ("SAR"). This evidence negates the possibility that a direct shift in production may have occurred, albeit over an extended time period. Additionally, one of the individuals contacted stated that the shift of production from Pennsylvania to Tennessee could have happened absent any shift to Mexico and that the two events were totally unrelated. *See* SAR at 24. Although the evidence is inconsistent on this point, *see* SAR at 23, the Court may not draw its own conclusion. *See Consolo*, 383 U.S. at 619–20. Here, the agency has chosen to credit the statement made by one individual over another as support for its determination that a two-step shift in production did not occur. *See* SAR at 42. Further, Labor obtained information providing a more detailed explanation of the articles produced at the facilities in Pennsylvania and Mexico and found them to be neither like nor directly competitive. *See* SAR at 17–18, 24, 34, 40–41. Finally, the organizational charts show that Cooper Industries did not consider the Pennsylvania and Tennessee facilities to be part of the same subdivision. *Compare* SAR at 29 *with* SAR at 31. This fulfills Labor's duty, cited by the Court, to make inquiries into the corporation's organizational structure. *Champion I* at 8. Thus, the Court finds Labor's remand determination as to the appropriate subdivision and whether the articles were like or directly competitive to be supported by substantial evidence.

III. Conclusion

For the reasons discussed herein, the Court finds that Labor's remand determination is supported by substantial evidence and is in accordance with law. The Court will enter judgment accordingly.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C00/13 2/14/00 Aquilino, J.	Alcan Aluminum Corp.	94–12–00733	7601.20.90 Free of duty with merchandise processing fee for goods not originating in the territory of Canada	CA7601.20.90 Free of duty at lower merchandise processing fee and entitled to preferential treatment under the US-Canada Free Trade Agreement	Alcan Corp. *v.* U.S., 165 F.3d 898 (1999)	Buffalo-Niagara Falls, NY Aluminum in various forms and shapes

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